DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 11-88
Title: Asid Mohamad, Individually and for the Estate of Azzam Rahim, Deceased, et al., Petitioners
v.
Palestinian Authority, et al.
Docketed: July 20, 2011
Linked with 10A1244
Lower Ct: United States Court of Appeals for the District of Columbia Circuit
Case Nos.: (09-7109, 09-7158)
Decision Date: March 18, 2011
Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Jun 15 2011	Application (10A1244) to extend the time to file a petition for a writ of certiorari from June 16, 2011 to July 16, 2011, submitted to The Chief Justice.
Jun 17 2011	Application (10A1244) granted by The Chief Justice extending the time to file until July 15, 2011.
Jul 15 2011	Petition for a writ of certiorari filed. (Response due August 19, 2011)
Jul 28 2011	Notice of related cases received from counsel for petitioners.
Aug 19 2011	Brief of respondents Palestinian Authority, and PLO in opposition filed.
Aug 31 2011	DISTRIBUTED for Conference of September 26, 2011.
Oct 3 2011	DISTRIBUTED for Conference of October 7, 2011.
Oct 11 2011	DISTRIBUTED for Conference of October 14, 2011.
Oct 17 2011	Petition GRANTED The case is to be argued in tandem with No. 10-1491, Kiobel v. Royal Dutch Petroleum.
Nov 14 2011	The time to file the joint appendix and petitioners' brief on the merits is extended to and including December 14, 2011.
Nov 14 2011	The time to file respondents' brief on the merits is extended to and including January 27, 2012.
Dec 8 2011	Consent to the filing of amicus curiae briefs in support of either party or neither party received from counsel for the respondents.
Dec 13 2011	Motion to dispense with printing the joint appendix filed by petitioner Asid Mohamad, Individually and for the Estate of Azzam Rahim, Deceased et al.
Dec 14 2011	Brief of petitioners Asid Mohamad, Individually and for the Estate of Azzam Rahim, Deceased et al. filed.
Dec 15 2011	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioners.

Dec 16 2011	Brief amicus curiae of Yale Law School Center for Global Legal Challenges filed. VIDED. (Distributed)
Dec 19 2011	SET FOR ARGUMENT ON Tuesday, February 28, 2012.
Dec 20 2011	Brief amicus curiae of Law Professors of Civil Liberties and 42 U.S.C-1983 filed. VIDED.
Dec 21 2011	Brief amicus curiae of Professor Juan Mendez, U.N. Special Rapporteur on Torture filed.
Dec 21 2011	Brief amici curiae of Larry Bowoto, et al. filed.
Dec 21 2011	Brief amici curiae of American Petroleum Institute, et al. filed.
Dec 21 2011	Brief amici curiae of Former U.S. Senator Arlen Specter, et al. filed. VIDED.
Dec 21 2011	Brief amici curiae of Dr. Juan Romagoza Arce, et al. filed. VIDED.
Dec 21 2011	Brief amicus curiae of Joseph E.Stiglitz filed. VIDED.
Dec 21 2011	Brief amici curiae of Nuremberg Scholars Omer Bartov, et al. filed. VIDED
Dec 22 2011	Record from U.S.D.C. for District of Columbia Circuit is electronic.
Dec 23 2011	Record recevied from U.S.C.A. for District of Columbia Circuit. (1 envelope)
Jan 6 2012	Motion to dispense with printing the joint appendix filed by petitioners GRANTED.
Jan 12 2012	CIRCULATED
Jan 27 2012	Brief of respondents Palestinian Authority, and PLO filed. (Distributed)
Feb 1 2012	Brief amicus curiae of KBR, Inc. filed. (Distributed)
Feb 3 2012	Brief amicus curiae of the United States filed. (Distributed)
Feb 3 2012	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
Feb 17 2012	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
Feb 17 2012	Reply of petitioners Asid Mohamad, Individually and for the Estate of Azzam Rahim, Deceased et al. filed. (Distributed)
Feb 28 2012	Argued. For petitioners: Jeffrey Fisher, Stanford, Cal. For respondents: Laura G. Ferguson, Washington, D. C.; Curtis E. Gannon, Assistant to the Solicitor General, Department of Justice, Washington, D. C. (for United States, as amicus curiae.)
Apr 18 2012	Adjudged to be AFFIRMED. Sotomayor, J., delivered the opinion of the Court, in which Roberts, C. J., and Kennedy, Thomas, Ginsburg, Breyer, Alito, and Kagan, JJ., joined, and in which Scalia, J., joined except as to Part III-B. Breyer, J., filed a concurring opinion.
May 21 2012	JUDGMENT ISSUED.
May 31 2012	Record returned to U.S.C.A. for District of Columbia Circuit.

PETITION FOR WRIT OF CERTIORARI

FILED
BRIEF
Supreme Court U.S.
OFFICE OF THE CLERK

No. 11-88

IN THE

Supreme Court of the United States

ASID MOHAMAD, individually and
for the Estate of AZZAM RAHIM;
SHAHID MOHAMAD; SAID MOHAMAD;
SHAHED AZZAM RAHIM; MASHHUD RAHIM;
MOHAMAD RAHIM; ASIA RAHIM,

Petitioners,

v.

JIBRIL RAJOUB; AMIN AL-HINDI; TAWFIK TIRAWI;
PALESTINIAN AUTHORITY, also known as
PALESTINIAN INTERIM SELF-GOVERNMENT AUTHORITY;
PALESTINE LIBERATION ORGANIZATION,

Respondents.

On Petition for a Writ of Certiorari to the United States District Court for the District of Columbia

PETITION FOR A WRIT OF CERTIORARI

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July 15, 2011

Supreme Court
Law Library

QUESTION PRESENTED

Whether the Torture Victim Protection Act, 28 U.S.C. § 1350 note § 2(a), permits actions against defendants which are not natural persons.

PARTIES TO THE PROCEEDINGS BELOW

Petitioners Asid Mohamad, Asid Mohamad for the Estate of Azzam Rahim, Shahid Mohamad, Said Mohamad, Shahed Azzam Rahim, Mashhud Rahim, Mohamad Rahim and Asia Rahim were plaintiffs in the district court and appellants in the court of appeals.

Respondents The Palestinian Authority and The Palestine Liberation Organization were defendants in the district court and appellees in the court of appeals.

Jibril Rajoub, Amin Al-Hindi and Tawfik Tirawi were defendants in the district court but the action against them was dismissed by the district court.

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28 U.S.C. § 1254(1) 2

IN THE

SUPREME COURT OF THE UNITED STATES

ASID MOHAMAD, individually and
for the Estate of AZZAM RAHIM;
SHAHID MOHAMAD; SAID MOHAMAD;
SHAHED AZZAM RAHIM; MASHHUD RAHIM;
MOHAMAD RAHIM; ASIA RAHIM,

Petitioners,

v.

JIBRIL RAJOUB; AMIN AL-HINDI; TAWFIK TIRAWI;
PALESTINIAN AUTHORITY, also known as
PALESTINIAN INTERIM SELF-GOVERNMENT AUTHORITY;
PALESTINE LIBERATION ORGANIZATION,

Respondents.

On Petition for a Writ of Certiorari to the
United States District Court
for the District of Columbia

PETITION FOR A WRIT OF CERTIORARI

Petitioners Asid Mohamad, Asid Mohamad for the Estate of Azzam Rahim, Shahid Mohamad, Said Mohamad, Shahed Azzam Rahim, Mashhud Rahim, Mohamad Rahim and Asia Rahim respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia in this case.

OPINIONS BELOW

The court of appeals' opinion (App. A, *infra*, 1a-13a) is published at 634 F.3d 604 (D.C. Cir. 2011). The district court's opinion (App. B, *infra*, 14a-21a) is published at 664 F.Supp.2d 20 (D.D.C. 2009).

STATEMENT OF JURISDICTION

The court of appeals entered judgment on March 18, 2011, App., *infra*, 1a. On June 17 2011, the Chief Justice extended the time within which to file a petition for a writ of certiorari to July 15, 2011. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The statute relevant to this case is the Torture Victim Protection Act, 28 U.S.C. § 1350 note, which provides as follows:

> Section 1. Short Title.
>
> This Act may be cited as the 'Torture Victim Protection Act of 1991'.
>
> "Sec. 2. Establishment of civil action.
>
> "(a) Liability.—An individual who, under actual or apparent authority, or color of law, of any foreign nation—
>
> "(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or

"(2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

"(b) Exhaustion of remedies.—A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.

"(c) Statute of limitations.—No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose.

"Sec. 3. Definitions.

"(a) Extrajudicial killing.—For the purposes of this Act, the term 'extrajudicial killing' means a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.

"(b) Torture.—For the purposes of this Act—

"(1) the term 'torture' means any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering aris-

ing only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind; and

"(2) mental pain or suffering refers to prolonged mental harm caused by or resulting from—

"(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

"(B) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

"(C) the threat of imminent death; or

"(D) the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality."

STATEMENT OF THE CASE

This case is a civil action for damages arising from the torture and murder of United States citizen Azzam Rahim by officers of Respondents Palestinian Authority ("PA") and Palestine Liberation Organization ("PLO").

Respondents' liability for the torture and murder of Mr. Rahim is indisputable. As our own Department of State has confirmed:

> In September [1995] detainee Azzam Rahim . . . an American citizen, died in the custody of PA intelligence officers in Jericho. Members of his family reported that bruises and cuts were visible on his head and face after his death. Results of an autopsy, conducted on Rahim after he had been interred for several weeks, showed that Rahim had broken ribs and appeared to have no heart damage, but the report said it was not possible to determine the cause of death. Three intelligence officers were sentenced for their role in the case. Two were sentenced to 1-year terms and one for 7 years.

JA A86.[1]

Indeed, Respondents have never disputed their liability for the torture and murder of Azzam Rahim.

---

[1] JA refers to the Joint Appendix submitted in the court of appeals.

Accordingly, the Petitioners, who are the widow, children and estate of decedent Azzam Rahim, filed suit against the Respondents under the Torture Victim Protection Act ("TVPA") 28 U.S.C. § 1350 note § 2(a), which provides in relevant part that:

> "An individual who, under actual or apparent authority, or color of law, of any foreign nation—
>
> "(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or
>
> "(2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

28 U.S.C. § 1350 note § 2(a).

Though TVPA § 2(a) refers to an action against "[a]n individual," district courts in the Eleventh Circuit and the Eleventh Circuit itself have explicitly held that a TVPA action may be brought against organizational defendants (such as the instant Respondents). *Sinaltrainal v. Coca-Cola Co.*, 256 F.Supp.2d 1345 (S.D.Fla. 2003), *aff'd* 578 F.3d 1252 (11th Cir. 2009) (citing *Clinton v. New York*, 524 U.S. 417, 428, n.13 (1998) for the holding that the term "individual" is synonymous with "person.").

Moreover, the TVPA is codified as part of the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, and

"Congress enacted the Torture Victim Act to codify the cause of action recognized [under the ATS] and to further extend that cause of action to plaintiffs who are U.S. citizens." *Kadic v. Karadzic*, 70 F.3d 232, 241 (2nd Cir. 1995) (citing H.R.Rep. No. 367, 102d Cong., 2d Sess., at 4 (1991), reprinted in 1992 U.S.C.C.A.N. 84, 86).

Most courts of appeals have held that an ATS action may be brought against an organizational defendant. *See Flomo v. Firestone Nat. Rubber Co., LLC*, ___ F.3d ___, 2011 WL 2675924 (7th Cir. July 11, 2011); *Doe v. Exxon Mobil Corp.*, ___ F.3d ___, 2011 WL 2652384 (D.C. Cir. July 8, 2011).

While a split panel of the Second Circuit has held that the ATS does not permit actions against organizational defendants, *see Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2nd Cir. 2010), numerous judges on the Second Circuit have concluded that the *Kiobel* "panel majority opinion is very likely incorrect." *Kiobel v. Royal Dutch Petroleum Co.*, 642 F.3d 379 at *1 (2nd Cir. 2011).

Moreover, the panel majority decision in *Kiobel* is currently the subject of a petition for certiorari in this Court. *See Kioebel v. Royal Dutch Petroleum Co.*, No. 10-1491.

Thus, in light of the express precedents holding that organizational defendants may be sued under the TVPA, as well as the case law holding that organizational defendants may also be sued under the ATS – holdings which should apply equally to the TVPA given the fact that Congress intended

the TVPA to extend the ATS cause of action to plaintiffs who are U.S. citizens – the Petitioners' action against the Respondents is well founded, notwithstanding the fact that the Respondents are not natural persons.

However, the district court and the court of appeals disagreed, and dismissed the Petitioners' action against the Respondents on the grounds that the TVPA permits actions against natural persons only – expressly rejecting the contrary holding of the Eleventh Circuit. *See* App. A, *infra*, at 1a-11a.[2]

REASONS FOR GRANTING THE PETITION

I. The Decision of the Court Below Directly Conflicts with a Decision of the Eleventh Circuit

As noted *supra*, and as the court of appeals expressly noted in its decision dismissing Petitioners' action, the Eleventh Circuit has explicitly held that a TVPA action may be brought against an organizational defendant. *See Sinaltrainal v. Coca-Cola Co.*, 256 F.Supp.2d 1345, 1359 (S.D.Fla. 2003) (holding corporation may be sued under TVPA), *aff'd in relevant part*, 578 F.3d 1252, 1264 n.13 (11th Cir. 2009); *Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008) (TVPA "allows suits against corporate defendants").

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[2] The Petitioners also asserted a cause of action under customary international law, as a part of federal common law, which was also dismissed. Petitioners do not seek review of the dismissal of that cause of action.

Thus, the decision of the court of appeals knowingly created a clear conflict between the circuits.

Petitioners respectfully submit that this circuit conflict, which will generate different and so inequitable results depending on the venue of the TVPA action, as well as inevitable forum-shopping, should not be permitted to stand. The ability of a plaintiff to obtain redress for torture or murder in U.S. courts should not depend on whether the torturer or murderer happens to be subject to personal jurisdiction in the courts in the Eleventh Circuit. Also, the specter of forum-shopping and attempts at forum-shopping is particularly strong here, considering that the statute at issue is not merely procedural but creates a cause of action.

Therefore, the instant Petition should be granted in order to settle this circuit split.

II. The Court of Appeal's Decision Is a Matter of Substantial Importance

There is no question that the TVPA is a remedial statute. *See e.g., Kadic v. Karadzic*, 70 F.3d 232, 241 (2nd Cir. 1995) (citing legislative history demonstrating that "Congress enacted the Torture Victim Act to codify the cause of action recognized [under the ATS] and to further extend that cause of action to plaintiffs who are U.S. citizens."

But the decision of the court of appeals directly undermines the remedial effect of the TVPA, severely restricting the types of defendants against which an American citizen can obtain relief.

A remedial statute – particularly a statute intended to provide relief for the most heinous conduct imaginable – should not be radically circumscribed by the decision of a lower court; this Court, and this Court alone, should determine whether the TVPA does not permit suits against organizational defendants.

The importance of review by this Court is highlighted by the sharp circuit split over the closely-related question of whether actions under the ATS – which the TVPA was intended to mirror for the benefit of American citizens – can be brought against organizational defendants, and the prospect that this Court will resolve this split by granting certiorari in *Kioebel v. Royal Dutch Petroleum Co.*, No. 10-1491.

In other words, the scope of the ATS and the TVPA in respect to organizational defendants cannot and should not be examined in a vacuum, and if this Court grants certiorari in the *Kioebel* matter it should grant the instant Petition as well, and consider both cases in tandem.

III. The Decision Is Incorrect

Finally, the instant Petition should be granted because the decision of the court of appeals is incorrect. The rationale for interpreting the term "individual" as used in the TVPA as including organizational defendants was set forth in persuasive detail in *Sinaltrainal v. Coca-Cola Co.*, 256 F.Supp.2d 1345 (S.D.Fla. 2003), *aff'd* 578 F.3d 1252 (11th Cir. 2009):

Defendant Bebidas contends that as a private corporation it is not subject to suit under the TVPA. Bebidas interprets the phrase "an individual . . . [who subjects another to torture or extrajudicial killing] shall, in a civil action, be liable for damages" as referring only to natural persons, arguing that Congress intended to hold liable only natural persons who commit torture or extrajudicial killing . . . Because a corporation is not a natural person, Bebidas reasons that the TVPA does not confer subject matter jurisdiction over a claim against a corporation. *See Beanal v. Freeport-McMoRan, Inc.*, 969 F.Supp. 362, 382 (E.D.La. 1997). Plaintiffs argue that by imposing liability on "individuals who subject others to torture or extrajudicial killing," the word "individual" is equivalent to "person." By analogy, Plaintiffs point to the fact that corporations are generally treated as persons in other areas of law, therefore, liability under the TVPA should also extend to corporations.

Defendants correctly point out that the district court in *Beanal* held that private corporations are not liable under the TVPA. *Id.* However, the *Beanal* court also stated that "[c]ongress does not appear to have had the intent to exclude private corporations from liability under the TVPA." *Id.* The Senate Judiciary Committee Report explains that the purpose of the TVPA is to permit suits

"against persons who ordered, abetted, or assisted in torture." S.Rep. No. 249, 102nd Cong., 1st Sess. (1991) . . . The Report does not mention any exemption for private corporations, *id.*, and courts have held corporations liable for violations of international law under the related ATCA. See generally, *NCGUB v. Unocal*, 176 F.R.D. 329 (C.D.Ca. 1997); *Wiwa*, 2002 WL 319887 (both allowing suits against private corporations under the ATCA). Moreover, the Supreme Court in *Clinton v. New York* recently held that the term "individual" is synonymous with "person," acknowledging that "'person' often has a broader meaning in the law" than in ordinary usage. *Clinton v. New York*, 524 U.S. 417, 428 and n. 13, 118 S.Ct. 2091, 141 L.Ed.2d 393 (1998). Bearing in mind that a corporation is generally viewed the same as a person in other areas of law, it is reasonable to conclude that had Congress intended to exclude corporations from liability under the TVPA, it could and would have expressly stated so.

Given that the legislative history does not reveal an intent to exempt private corporations from liability, that private corporations can be sued under the ATCA, and that the term "individual" is consistently viewed in the law as including corporations, this court concludes that the TVPA claim against Bebidas should not be dismissed for lack of subject matter jurisdiction.

Sinaltrainal, 256 F.Supp.2d at 1358-1359 (emphasis added). *See also Estate of Rodriquez v. Drummond Co., Inc.*, 256 F.Supp.2d 1250, 1266-67 (N.D.Ala. 2003) (adopting reasoning of *Sinaltrainal*).

Thus, for the reasons set forth in *Sinaltrainal*, the court of appeals erred by holding that TVPA claims are not available against organizational defendants. *Cf. Clinton v. New York*, 524 U.S. 417, 428 (1998) (holding that "individual" is synonymous with "person").

Moreover, the decision of the court of appeals directly undermines the purpose of the TVPA, which was to extend the protections of the ATS to American citizens. "Congress enacted the Torture Victim Act to codify the cause of action recognized [under the ATS], and to further extend that cause of action to plaintiffs who are U.S. citizens." *Kadic v. Karadzic*, 70 F.3d 232, 241 (2d. Cir. 1995) (citing H.R.Rep. No. 367, 102d Cong., 2d Sess., at 4 (1991), reprinted in 1992 U.S.C.C.A.N. 84, 86).

Most courts of appeals – including the D.C. Circuit itself – have held that an ATS action may be brought against an organizational defendant. *See Doe v. Exxon Mobil Corp.*, ___ F.3d ___, 2011 WL 2652384 (D.C. Cir. July 8, 2011); *Flomo v. Firestone Nat. Rubber Co., LLC*, ___ F.3d ___, 2011 WL 2675924 (7th Cir. July 11, 2011).

Thus, as matters currently stand in the District of Columbia, an alien can sue an organizational defendant under the ATS, but a U.S. citizen cannot

bring an action against an organizational defendant under the TVPA. This result is not only incongruous and unjust; it also conflicts directly with Congress' purpose in enacting the TVPA.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
July 15, 2011

Respectfully submitted,

THE BERKMAN LAW OFFICE

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APPENDIX

UNITED STATES COURT OF APPEALS.
DISTRICT OF COLUMBIA CIRCUIT.

ASID MOHAMAD, Individually and for the Estate of AZZAM RAHIM, et al.,

Appellants

v.

JIBRIL RAJOUB, et al.,

Appellees.

Nos. 09-7109, 09-7158.

Argued Oct. 19, 2010.

Decided March 18, 2011.

Widow and sons of a United States citizen allegedly tortured and killed in Israel brought suit against three individuals, the Palestinian Authority (PA), and the Palestine Liberation Organization (PLO), alleging violations of the Torture Victim Protection Act (TVPA), the Alien Tort Statute (ATS), and federal common law. The United States District Court for the District of Columbia, 664 F.Supp.2d 20, granted a motion to dismiss made by the PA and PLO. Plaintiffs appealed.

The Court of Appeals, Ginsburg, Circuit Judge, held that:

(1) TVPA does not create a cause of action against an organization, as opposed to a natural person, and

(2) plaintiffs had no cause of action cognizable under the federal-question jurisdiction statute for an alleged violation of federal common law.

Affirmed.

***605** Appeals from the United States District Court for the District of Columbia (No. 1:08-cv-01800). Robert J. Tolchin argued the cause and filed the briefs for appellants.

Laura G. Ferguson argued the cause for appellees. With her on the brief was Kevin G. Mosley. Richard A. Hibey and Mark J. Rochon entered appearances.

Before: GINSBURG, TATEL and GARLAND, Circuit Judges.

Opinion for the Court filed by Circuit Judge GINSBURG.

GINSBURG, Circuit Judge:

The sons and widow of Azzam Rahim sued the Palestinian Authority and the Palestine Liberation Organization for damages on behalf of Rahim's estate. The plaintiffs alleged the defendants tortured and killed Rahim in violation of both the Tor-

ture Victim Protection Act (TVPA), 28 U.S.C. § 1350, note § 2(a), and federal common law. The district court granted the defendants' motion to dismiss, concluding only a natural person is amenable to suit under the TVPA and the Rahims had no cause of action under federal common law. We affirm the judgment of the district court.

I. Background

Because the district court dismissed this case on the basis of the complaint alone, we assume for the purpose of this appeal that the allegations therein are in all respects true. *Meijer, Inc. v. Biovail Corp.*, 533 F.3d 857, 865-66 (D.C.Cir. 2008). According to the complaint, Azzam Rahim, a Palestinian born and raised in the West Bank, became a citizen of the United States after moving here in the 1970s. The events in suit took place when Rahim visited the West Bank in 1995. While he was sitting in a coffee shop, some two to four men, who identified themselves as security police, forced him into an unmarked ***606** car. They took Rahim to a prison in Jericho, where he was tortured and eventually killed. In 1996 the U.S. Department of State issued a report on human rights practices in the West Bank since Israel had transferred certain responsibilities over the area to the Palestinian Authority. The report stated that Rahim had "died in the custody of PA intelligence officers in Jericho."

The Rahims initially filed suit in the U.S. District Court for the Southern District of New York.

In 2007 that court entered a default against the defendants, neither of which had answered the complaint.* After the defendants moved to vacate the entry of default and to dismiss the Rahims' complaint for, among other reasons, lack of personal jurisdiction in that district, the court granted the Rahims' motion to transfer the case to the District Court for the District of Columbia, where the defendants renewed their motions to vacate the entry of default and to dismiss the Rahims' complaint.

Granting the defendants' motions, the district court set aside the entry of default and dismissed the case pursuant to Federal Rule of Civil Procedure 12(b)(6), holding the plaintiffs have no cause of action under either the TVPA or federal common law. *Mohamad v. Rajoub*, 664 F.Supp.2d 20, 22-24 (D.D.C. 2009). The Rahims now appeal.

II. Analysis

The plaintiffs present three issues on appeal: (1) whether the district court abused its discretion in vacating the entry of default, *see Jackson v. Beech*, 636 F.2d 831, 835 (D.C.Cir. 1980), and, if not, whether the Rahims have a cause of action under (2) the TVPA or (3) federal common law. We review the latter two issues de novo. *See Rochon v. Gonzales*, 438 F.3d 1211, 1216 (D.C.Cir. 2006).

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* No judgment was ever entered upon the default.

A. Setting Aside the Default

First, we hold the district court did not abuse its discretion in setting aside the default entered against the defendants pursuant to Federal Rule of Civil Procedure 55(c), which rule permits a district court to "set aside an entry of default for good cause." *See also Jackson,* 636 F.2d at 836 ("strong policies favor resolution of disputes on their merits"). In exercising its discretion, the district court is supposed to consider "whether (1) the default was willful, (2) a set-aside would prejudice plaintiff, and (3) the alleged defense was meritorious." *Keegel v. Key West & Caribbean Trading Co.,* 627 F.2d 372, 373 (D.C.Cir. 1980). In this case, the district court did not say why it granted the defendants' motion to vacate but, as it happens, we need not remand the case because the Rahims' only argument against setting aside the default is that the defendants presented no "meritorious defense" to this action.

As the defendants note, "allegations are meritorious if they contain even a hint of a suggestion which, proven at trial, would constitute a complete defense." *Id.* at 374 (internal quotation marks and citations omitted). The defendants far surpassed this standard, as will be seen in what follows.

B. The Torture Victim Protection Act

The TVPA was enacted in 1992 in order to create "a civil action for recovery of damages from an individual who engages in torture or extrajudicial killing." Pub.L. No. 102-256, 106 Stat. 73 (1992)

(codified at 28 U.S.C. § 1350, note). The relevant provision of the TVPA states:

> ***607** (a) Liability.—An individual who, under actual or apparent authority, or color of law, of any foreign nation—
>
> (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or
>
> (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

28 U.S.C. § 1350, note § 2(a). The defendants argue the district court properly dismissed the Rahims' claim under the TVPA because this provision does not create a cause of action against an organization, as opposed to a natural person.

We begin our inquiry, as always, with the text of the statute. *Bismullah v. Gates*, 551 F.3d 1068, 1072 (D.C.Cir. 2009). The Rahims claim the Palestinian Authority and the PLO are amenable to suit under the TVPA because the word "individual," in referring to the perpetrator of torture or of extrajudicial killing, includes organizations. The Rahims' authority for this proposition is limited to the observation that the term "individual" is "consistently viewed in the law as including corporations." *Sinaltrainal v. Coca-Cola Co.*, 256 F.Supp.2d 1345, 1359 (S.D.Fla. 2003) (holding corporation may be sued under TVPA), *aff'd in relevant part*, 578 F.3d

1252, 1264 n. 13 (11th Cir. 2009); *see also Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008) (TVPA "allows suits against corporate defendants"); *United States v. Middleton*, 231 F.3d 1207, 1210 (9th Cir. 2000) (statute making it a crime to access certain computers and thereby cause damage to "one or more individuals" applies to injured corporations). The defendants, for their part, argue "individual" should be understood in its ordinary sense, meaning only a natural person. *See, e.g., In re North (Gadd Fee Application)*, 12 F.3d 252, 254-55 (D.C.Cir. 1994) ("individual" as used in the fee provision of the Ethics in Government Act describes only natural persons).

We agree with the defendants. Because the Congress did not define the term "individual" in the TVPA, we give the word its ordinary meaning, *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187, 115 S.Ct. 788, 130 L.Ed.2d 682 (1995), which typically encompasses only natural persons and not corporations or other organizations, *North*, 12 F.3d at 254 ("In common usage, 'individual' describes a natural person") (citation omitted); *cf. Clinton v. City of New York*, 524 U.S. 417, 428 n. 13, 118 S.Ct. 2091, 141 L.Ed.2d 393 (1998) (" 'person' often has a broader meaning in the law" than does "individual"). Notably, the Dictionary Act, which provides guidance in "determining the meaning of any Act of Congress," strongly implies the word individual does not comprise organizations because it defines "person" to include "corporations, companies, associations, firms, partnerships, societies, . . . *as well as individuals.*" 1 U.S.C. § 1; *see also Bowoto v.*

Chevron Corp., 621 F.3d 1116, 1126-27 (9th Cir. 2010) (through the Dictionary Act, the "Congress has directed courts to presume the word 'individual' in a statute refers to natural persons and not corporations").

The Rahims nonetheless argue the term "individual" is at least ambiguous, wherefore the court should look to the purpose of the TVPA, which supports liability for organizations. Quoting *Kadic v. Karadzic*, 70 F.3d 232, 241 (2d Cir. 1995), they reason that because the Congress enacted the TVPA in order "to codify the cause of action" recognized by the Alien Tort Statute, 28 U.S.C. § 1350, and to "extend that cause of action to plaintiffs who are U.S. citizens," and because the ATS permits a ***608** plaintiff to sue an organization, the TVPA must do also. *See Sinaltrainal*, 578 F.3d at 1263 ("corporate defendants are subject to liability under the ATS"). *But see Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 120 (2d Cir. 2010) (ATS does not confer jurisdiction over claims against corporations).**

We reject the Rahims' argument because the structure of the TVPA confirms what the plain text of the statute shows: The Congress used the word "individual" to denote only natural persons. The liability provision of the statute uses the word "individual" five times in the same sentence—four times to refer to the victim of torture or extrajudicial killing, which could be only a natural person,

** The issue whether corporations may be held liable in a suit brought under the ATS is pending before this court in *Doe v. Exxon Mobil Corp.*, No. 09-7125 (D.C.Cir. argued Jan. 25, 2011)

and once to the perpetrator of the torture or killing. § 1350, note § 2(a). The Rahims advance no cogent reason, and we see none, to think the term "individual" has a different meaning when referring to the victim as opposed to the perpetrator. *See Bowoto,* 621 F.3d at 1127 ("There is no indication Congress intended 'individual' to have a variety of meanings throughout the TVPA"); *Comm'r v. Lundy,* 516 U.S. 235, 250, 116 S.Ct. 647, 133 L.Ed.2d 611 (1996) ("the normal rule of statutory construction" is "that identical words used in different parts of the same act are intended to have the same meaning") (internal quotation marks and citations omitted). We note also the liability provision uses the word "person" in reference to those "who may be a claimant in an action for wrongful death," § 1350, note § 2(a)(2); because a claimant could be a non-natural person, such as the decedent's estate, this further supports the significance of the Congress having used "individual" rather than "person" to identify who may be sued under the TVPA.

To be sure, there are, as the Rahims note, situations in which the same word in a single statute has a different scope, depending upon its precise context. They point to *Weaver v. U.S. Information Agency,* 87 F.3d 1429 (D.C.Cir. 1996), where this court said, "Identical words may have different meanings where the subject-matter to which the words refer is not the same . . ., or the conditions are different, or the scope of the legislative power exercised in one case is broader than that exercised in another," *id.* at 1437 (internal quotation marks

and citation omitted). Because none of those conditions obtains here, the more applicable statement in *Weaver* is the topic sentence of the same paragraph: "Normally, the same word appearing in different portions of a single provision or act is taken to have the same meaning in each appearance." *Id.*

In their reply brief, the Rahims for the first time argue in the alternative the defendants are secondarily liable for Rahim's death either pursuant to the principle of respondeat superior or for aiding and abetting his killer(s). *See Sinaltrainal,* 578 F.3d at 1258 n. 5 ("the TVPA permits aiding and abetting liability"); *but see Bowoto,* 621 F.3d at 1128 (rejecting argument plaintiffs could sue corporation "under the TVPA upon a theory of 'aiding and abetting' "). This argument comes too late. *Sitka Sound Seafoods, Inc. v. NLRB,* 206 F.3d 1175, 1181 (D.C.Cir. 2000) ("In order to prevent . . . sandbagging of appellees and respondents, we have generally held that issues not raised until the reply brief are waived") (internal quotation marks and citation omitted). In any event, we doubt the Rahims could prevail upon such a theory ***609** of liability. As the Ninth Circuit observed, even if we assume some form of vicarious liability is possible, the text of the TVPA still "limits such liability to individuals," *Bowoto,* 621 F.3d at 1128, and we have already seen that in this statute "individual" comprises only natural persons.

In sum, we hold the TVPA does not permit a suit against either the Palestinian Authority or the PLO. Accordingly, we affirm the judgment of the

district court dismissing the Rahims' claim under the TVPA.

C. Federal Common Law

The Rahims also advance a claim against the Palestinian Authority and the PLO under "customary international law, as a part of federal common law," over which this court has federal-question jurisdiction pursuant to 28 U.S.C. § 1331. In response, the defendants maintain the Supreme Court's opinion in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 124 S.Ct. 2739, 159 L.Ed.2d 718 (2004), precludes such a claim. They also rely upon a recent Ninth Circuit decision, *Serra v. Lappin*, 600 F.3d 1191 (2010), in which the court rejected the idea that any federal statute other than the ATS "recognizes a general cause of action under the law of nations." *Id.* at 1197, 1197-98 n. 7 ("If any plaintiff could bring any claim alleging a violation of the law of nations under federal-question jurisdiction, there would be no need for statutes such as the ATS and the [TVPA], which recognize or create limited causes of action for particular classes of plaintiffs (aliens) or particular violations (torture)").

As the defendants note, the Supreme Court in *Sosa* cautioned against reading § 1331 to imply a federal common law claim for a violation of the law of nations. One issue in that case was whether the plaintiff had a remedy under the ATS against a foreign national whom the Drug Enforcement Administration had hired to abduct the plaintiff from Mexico. 542 U.S. at 697-98, 124 S.Ct. 2739. The

Court explained that although the ATS is a "jurisdictional statute creating no new causes of action," the "historical materials" indicate it "was intended to have practical effect the moment it became law" in 1789. *Id.* at 724, 124 S.Ct. 2739. Accordingly, the Court concluded, "The jurisdictional grant" in the ATS "is best read as having been enacted on the understanding that the common law would provide a cause of action for" a "modest number of international law violations," including at least "Blackstone's three primary offenses: violation of safe conducts, infringement of the rights of ambassadors, and piracy." *Id.* Because nothing between the enactment of the ATS and our modern case law "has categorically precluded federal courts from recognizing a claim under the law of nations as an element of common law," the Court added that federal courts today may consider "new cause[s] of action" under the ATS, but only with "great caution." *Id.* at 724-28, 124 S.Ct. 2739.

The Supreme Court also went on, however, to caution that its decision should not be read as "imply[ing] that every grant of jurisdiction to a federal court carries with it an opportunity to develop common law." *Id.* at 731 n. 19, 124 S.Ct. 2739. Indeed, the Court expressly distinguished the ATS—under which a cause of action for a violation of the law of nations could be recognized—from § 1331, stating: "Section 1350 [i.e., the ATS] was enacted on the congressional understanding that courts would exercise jurisdiction by entertaining some common law claims derived from the law of nations," whereas federal-question jurisdiction

pursuant to § 1331 was not "extended subject to any comparable congressional assumption"; indeed a "more expansive common law power*610 related to 28 U.S.C. § 1331" may not be "consistent with the division of responsibilities between federal and state courts after *Erie* [*v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938)]." *Id.*

Accordingly, following the Supreme Court's guidance in *Sosa*, we hold the Rahims do not have a cause of action cognizable under § 1331 for an alleged violation of federal common law. The district court correctly so held in dismissing this aspect of their complaint.

III. Conclusion

For the foregoing reasons, the judgment of the district court is

Affirmed.

C.A.D.C.,2011.
Mohamad v. Rajoub
634 F.3d 604, 394 U.S.App.D.C. 277

UNITED STATES DISTRICT COURT,
DISTRICT OF COLUMBIA.

Asid MOHAMAD, Shahid Mohammad,
Said Mohamad, Shahed Azzam Rahim,
Mashhud Rahim, Mohamad Rahim, Asia Rahim,

Plaintiffs

v.

Jibril RAJOUB, Amin Al-Hindi, Tawfik Tirawi,
Palestinian Authority,
Palestine Liberation Organization,

Defendants.

Civil Case No. 08-1800 (RJL)
Sept. 30, 2009.

Widow and sons of U.S. citizen allegedly tortured and killed in the West Bank of Israel brought action against three individuals, the Palestinian Authority (PA), and the Palestine Liberation Organization (PLO), alleging violations of the Torture Victim Protection Act (TVPA), the Alien Tort Statute (ATS), and federal common law. PA and PLO moved to dismiss.

The District Court, Richard J. Leon, J., held that:

(1) PA and PLO were not "individuals" within meaning of the TVPA, and

(2) allegation that PA and PLO inflicted torture on plaintiffs' decedent failed to state a claim for violation of federal common law.

Motion granted.

---

*21 Robert Joseph Tolchin, Brooklyn, NY, for Plaintiffs.

Laura G. Ferguson, Mark J. Rochon, Richard A. Hibey, Miller & Chevalier, Chartered, Washington, DC, for Defendants.

MEMORANDUM OPINION

RICHARD J. LEON, District Judge.

Plaintiffs in this case are the widow and sons of Azzam Rahim, a U.S. citizen, who was tortured and killed in the West Bank of Israel in September 1995. The defendants are three individuals (i.e. Jibril Rajoub, Amin Al-Hindi, and Tawfik Tirawi), the Palestinian Authority, and the Palestine Liberation Organization. Plaintiffs allege that the defendants violated the Torture Victim Protection Act ("TVPA"), the Alien Tort Statute, and federal common law. Defendants Palestinian Authority and the Palestine Liberation Organization ("defendants") have filed a Motion to Dismiss on the

grounds that plaintiffs' complaint failed to state a claim on which relief may be granted under the TVPA, the Alien Tort Statute,[1] or federal common *22 law.[2] For the following reasons, the Court GRANTS the defendants' motion.

ANALYSIS

Plaintiffs first allege defendants violated the TVPA, which creates a cause of action for torts committed by "individual[s]" "in violation of the law of nations or a treaty of the United States." 28 U.S.C. §§ 1350 & 1350 note § 2(a)(1)-(2). Plaintiffs argue that the Court should broadly interpret "individual" to include organizations, such as the Palestinian Authority and the Palestine Liberation Organization, similar to the way courts often interpret "person." (*See* Pl.'s Mem. in Opp'n to Def.'s Mot. to Dismiss ("Pl.'s Opp'n") [Dkt. # 14] at 5-7.)

---

[1] Plaintiffs initially sought relief under the Alien Tort Statute. 28 U.S.C. § 1350. However, this statute grants district courts jurisdiction over civil actions filed only by "alien[s]." 28 U.S.C. § 1350. And, as plaintiffs admit, the deceased and all of the plaintiffs are citizens of the United States. (*See* Pl.'s Mem. in Opp'n to Def.'s Mot. to Dismiss ("Pl.'s Opp'n") [Dkt. # 14] at 11.) In accordance with plaintiffs' concession, the Court also dismisses the Alien Tort Statute's claims.

[2] The individual defendants have not joined the organizational defendants in filing the motion to dismiss, (Mem. of Law in Support of the Palestinian Authority's and the Palestine Liberation Organization's Mot. to Dismiss ("Mot. to Dismiss") [Dkt. # 11] at 4 n. 1), and the Court does not address plaintiffs' claims against the individual defendants.

Defendants, not surprisingly, argue that "individual" is limited to human beings. (Mem. of Law in Support of the Palestinian Authority's and the Palestine Liberation Organization's Mot. to Dismiss ("Mot. to Dismiss") [Dkt. # 11] at 9-13.) I agree.

A plain reading of the statute and applicable case law in this jurisdiction, leads this Court to overwhelmingly conclude that the term "individual" includes only human beings, and does not encompass the Palestinian Authority and the Palestine Liberation Organization. *See Clinton v. New York*, 524 U.S. 417, 428 n. 13, 118 S.Ct. 2091, 141 L.Ed.2d 393 (1998) (noting that "person" ordinarily has a broader meaning than "individual"); *Fisher v. Great Socialist People's Libyan Arab Jamahiriya*, 541 F.Supp.2d 46, 50 n. 2 (D.D.C. 2008) ("[T]he TVPA only creates a cause of action against individuals, not states."); *Holland v. Islamic Republic of Iran*, 496 F.Supp.2d 1, 18 (D.D.C. 2005) (holding, based on the plain language of the statute and the legislative history, that the TVPA applies only to individuals, not foreign states); *Doe v. Exxon Mobil Corp.*, 393 F.Supp.2d 20, 28 (D.D.C. 2005) ("On balance, the plain reading of the statute strongly suggests that it only covers human beings, and not corporations."); *Collett v. Socialist Peoples' Libyan Arab Jamahiriya*, 362 F.Supp.2d 230, 242 (D.D.C. 2005) (holding the TVPA applies only to individuals, not Libya or a Libyan intelligence agency); *Dammarell v. Islamic Republic of Iran*, No. 01-2224, 2005 WL 756090, *31 (D.D.C. Mar. 29, 2005); *see also In re Terrorist Attacks on September 11*,

2001, 392 F.Supp.2d 539, 565 (S.D.N.Y. 2005) ("The TVPA claims against [certain named defendants] are dismissed because these Defendants are not individuals."); *but see Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1265 (11th Cir. 2005) (allowing a TVPA claims to be raised against corporations). Of course, this conclusion is also consistent with Congress's decision to use the term "individual" in the TVPA to describe both those who commit torture and extrajudicial killings and those who are victims. *See* 28 U.S.C. § 1350 note §§ 2(a)(1)-(2).

Moreover, the TVPA's legislative history further supports the conclusion that the Palestinian Authority and the Palestine Liberation Organization are not proper defendants under the TVPA. *See* H.R.Rep. No. 102-367 (1991), 1992 U.S.Code Cong. & Admin.News 1991, pp. 84, 87 ("Only ***23** 'individuals,' not foreign states, can be sued under the bill."); S.Rep. No. 102-249, 1, 6 (1991) ("The legislation uses the term 'individual' to make crystal clear that foreign states or their entities cannot be sued under this bill under any circumstances: only individuals may be sued."). Simply stated, Congress's plain intent as reflected in the text (which specifies only individuals) and the legislative history (which could not be clearer) "was to confine liability for acts of torture and extrajudicial killing to private individuals." *Dammarell*, No. 01-2224, 2005 WL 756090 at *31. Therefore, this Court finds plaintiffs cannot bring a TVPA claim against the Palestinian Authority or the Palestine Liberation

Organization, and the Court dismisses these claims.

Next, plaintiffs claim to have a cause of action under federal common law against these two organizations. I disagree. Plaintiffs' claim that "torture carried out by a public official or one acting in an official capacity" *is* a violation of federal common law, as reflected in the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment and the United Nations' Declaration on the Protection of All Persons from Being Subjected to Torture, (Pl.'s Opp'n at 14), is, at best, strained. Unfortunately, plaintiffs' additional argument that the Supreme Court held this in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 124 S.Ct. 2739, 159 L.Ed.2d 718 (2004), is similarly exaggerated. (Pl.'s Opp'n at 12 (arguing that the Supreme Court in *Sosa* "recognized torture as being on the short list of actionable torts under international law and so under federal common law").)

The question in *Sosa* was which causes of action would be permissible under the Alien Tort Statute, 28 U.S.C. § 1350. Plaintiffs' claim that the general federal question jurisdiction statute, 28 U.S.C. § 1331, provides this Court with jurisdiction to fashion a cause of action for them out of federal common law is not supported by the *Sosa* decision. Indeed, the Supreme Court in *Sosa* explicitly limited its discussion to the Alien Tort Statute and specifically excluded § 1331:

> Our position does not . . . imply that every grant of jurisdiction to a federal court carries with it an opportunity to develop federal common law (so that the grant of federal-question jurisdiction would be equally as good for our purposes as § 1350). . . . Section 1350 was enacted on the congressional understanding that some courts would exercise jurisdiction by entertaining some common law claims derived from the law of nations; and we know of no reason to think that federal-question jurisdiction was extended subject to any comparable congressional assumption. Further, our holding today is consistent with the division of responsibilities between federal and state courts after *Erie* [*v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938)] as a more expansive common law power related to 28 U.S.C. § 1331 might not be.

Sosa, 542 U.S. at 731 n. 19, 124 S.Ct. 2739 (internal citation omitted).

Our Circuit Court has similarly noted that describing actions that are brought under the Foreign Sovereign Immunities Act (and presumably, the Alien Tort Statute) as "federal common law" is a "misnomer." *Bettis v. Islamic Republic of Iran*, 315 F.3d 325, 333 (D.C.Cir. 2003). Those actions are based on *statutory* rights. *Id.* "Without the statute, the claims could not arise," and absent a statute creating a cause of action, courts are not "authorize[d] . . . to fashion a complete body of federal law." *Id.* (internal quotation omitted).

The Supreme Court itself has also "repeatedly said that a decision to create a *24 private right of action is one better left to legislative judgment in the great majority of cases." *Sosa*, 542 U.S. at 727, 124 S.Ct. 2739. Surely, caution in developing a cause of action under federal common law is appropriate in situations such as this where Congress has already established a cause of action and explicitly defined its scope in the TVPA. "The fact that Congress has provided at least one statute that provides such a cause of action (the Torture Victim Protection Act) cautions against the construction of another by judicial fiat." *The Herero People's Reparations Corp. v. Deutsche Bank AG*, No. 01-1868, 19 (D.D.C. July 31, 2003).

In short, plaintiffs ask this Court to effectively amend the TVPA's requirements by treating their claim as one arising under federal common law. To do so would be inconsistent with the controlling judicial precedent and Congress's legislative directive to date. Plaintiffs would thus be better off seeking such relief from Congress than the Federal Courts. Accordingly, for all of the aforementioned reasons, the Court must and will GRANT the defendants' Motion to Dismiss. An Order consistent with this Memorandum Opinion is attached.

D.D.C., 2009.
Mohamad v. Rajoub
664 F.Supp.2d 20

OPPOSITION BRIEF

No. 11-88

IN THE

Supreme Court of the United States

ASID MOHAMAD, INDIVIDUALLY AND FOR THE ESTATE OF AZZAM RAHIM, DECEASED, SHAHID MOHAMAD, SAID MOHAMAD, SHAHED MOHAMAD, MASHHUD RAHIM, MOHAMAD RAHIM, ASIA RAHIM,

Petitioners,

v.

JIBRIL RAJOUB, AMIN AL-HINDI, TAWFIK TIRAWI, PALESTINIAN AUTHORITY, ALSO KNOWN AS PALESTINIAN INTERIM SELF-GOVERNMENT AUTHORITY, PALESTINE LIBERATION ORGANIZATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the term "individual," as used in the Torture Victim Protection Act, refers to natural persons only, precluding suit against the Palestinian Authority and Palestine Liberation Organization.

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INTRODUCTION

The Torture Victim Protection Act ("TVPA") establishes a civil cause of action where "[a]n individual," acting "under actual or apparent authority, or color of law, of any foreign nation subjects an individual to torture." 28 U.S.C. § 1350 note § 2(a)(1). The U.S. Court of Appeals for the D.C. Circuit properly held that "individual" refers to natural persons only and affirmed the dismissal of the action against the Palestinian Authority ("PA") and Palestine Liberation Organization ("PLO").

Petitioners argue that the petition should be granted to settle a "clear conflict" between the D.C. Circuit and Eleventh Circuit as to whether a TVPA action may be brought against organizational defendants. Pet. 9. Petitioners fail to include any discussion of the Eleventh Circuit decisions that give rise to this perceived conflict. In fact, the Eleventh Circuit decision petitioners cite (*id.* at 8), *Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008), does not analyze the scope of "individual" under the TVPA, but rather the court states it is "bound by" its earlier decision in *Aldana v. Del Monte Fresh Produce, N.A. Inc.*, 416 F.3d 1242 (11th Cir. 2005), a case petitioners do not even cite. *Romero*, 552 F.3d at 1315. As the Ninth Circuit recently observed, "[i]t does not appear the defendants in [*Aldana*] ever challenged the notion of corporate liability, . . . and the Eleventh Circuit did not explain its reasoning on the issue." *Bowoto v. Chevron Corp.*, 621 F.3d 1116, 1126 (9th Cir. 2010), *petition for cert. filed*, No. 10-1536 (June 20, 2011).

Because the Eleventh Circuit has only assumed without analysis that there is corporate liability under the TVPA, the circuit conflict is not sufficiently developed to warrant the Court's review.

The petition should be denied for the additional reason that the judgment below can be affirmed on an alternate ground. The TVPA requires that the "individual" who "subjects an individual to torture" has done so "under actual or apparent authority, or color of law, *of any foreign nation*." 28 U.S.C. § 1350 note § 2(a) (emphasis added). The PA and PLO argued to both the district court and court of appeals that they do not act under color of law of a "foreign nation," and thus petitioners could not meet the TVPA' s state action requirement. The court of appeals did not reach this argument, having disposed of the case on the ground that TVPA claims may brought only against natural persons.

Finally, the petition should be denied because the D.C. Circuit's ruling was correct. The ordinary meaning of "individual" is a single natural person. In the TVPA Congress used the term "individual" rather than "person," the term Congress generally uses when intending to refer to both natural persons and corporations or other legal entities. Moreover, the TVPA uses "individual" to refer to a victim of torture or extrajudicial killing, making natural person the only meaning that logically can be applied to "individual," as used in the TVPA.

STATEMENT OF THE CASE

As an initial matter, respondents must address a mischaracterization of the record. In their

Statement of the Case, petitioners assert that the PA's and PLO's "liability for the torture and murder of Mr. Rahim is indisputable" and further assert that the PA and PLO "have never disputed their liability for the torture and murder of Azzam Rahim." Pet. 5. To the contrary, the PA and PLO vigorously contested their liability on a number of grounds in their motion to dismiss, which the district court granted. To the extent petitioners are referring to whether either the PA or PLO, as a purely factual matter and divorced from the requirements of the TVPA, bears any responsibility for Mr. Rahim's alleged torture and murder, petitioners neglect to clarify that "the district court dismissed this case on the basis of the complaint alone." *See* Pet. App. 3a. When arguing the motion to dismiss, and for affirmance of the dismissal, the PA and PLO were obligated to treat the allegations in the complaint as true. *See id.* In any event, the PA and PLO denied responsibility at both the district and appellate court levels. *See* PA/PLO C.A. Br. at 55.

This lawsuit arises out of the following unproven allegation: On September 27, 1995, members of the Palestinian Preventive Security Services arrested Palestinian-American Azzam Rahim in the West Bank village of Ein Yabroud and took him to the Jericho prison where he was tortured and eventually killed on September 29, 1995. JA at A62, ¶ 18. Rahim's estate, widow and six sons (the "Rahim Family") initiated this lawsuit ten years later, on September 27, 2005. The Rahim Family named five defendants (1) Jabril Rajoub, "head of the Palestinian Preventive Security Force in the West Bank," (2) Amin Al-Hindi, "chairman of the

Palestinian General Intelligence Service," (3) Tawfik Tirawi, the "PA's General Security Chief responsible for the West Bank," (4) the Palestinian Authority, and (5) the PLO. *Id.* at A61, ¶¶ 10-14.

The complaint alleged that Azzam Rahim was the victim of torture and extrajudicial killing carried out by unidentified individuals employed by one or more Palestinian Authority security services and sought relief under the Torture Victim Protection Act, 28 U.S.C. § 1350 note; the Alien Tort Statute, 28 U.S.C. § 1350; and federal common law. JA at A67-71.

The Palestinian Authority and PLO filed a motion to dismiss all three claims. In their opposition to the motion to dismiss, the Rahim Family conceded the district court could not exercise jurisdiction under the Alien Tort Statute because the plaintiffs are U.S. citizens. *See* Pet. App. 16a n.1. "In accordance with plaintiffs' concession," the district court dismissed the Alien Tort Statute claim. *Id.* The district court granted the motion to dismiss as to the remaining TVPA and federal common law claims against the PA and PLO. *Id.* at 14a-21a. The Rahim Family subsequently voluntarily dismissed with prejudice their claims against the individual defendants, resulting in the entry of Final Judgment. *See* JA at A148-49.

The Rahim Family appealed the dismissal of their TVPA and federal common law claims against the PA and PLO. The U.S. Court of Appeals for the D.C. Circuit affirmed the dismissal of both claims. The Rahim Family does not seek this Court's review as to the federal common law claim.

As to the TVPA claim, the PA and PLO argued the following on appeal: (1) only natural persons may be sued, and thus the PA and PLO are not proper defendants; and (2) the Rahim Family failed to state a claim for which relief could be granted because they cannot satisfy the statute's state action requirement.

With respect to whether the PA or PLO can be sued under the TVPA, the court of appeals agreed with respondents that "individual," as used in the statute, must be given "its ordinary meaning, which typically encompasses only natural persons and not corporations or other organizations . . . ." Pet. App. 7a (internal citation omitted).

The court of appeals then concluded that the "structure of the TVPA confirms what the plain text of the statute shows." Pet. App. 8a. As the court explained, "[t]he liability provision of the statute uses the word 'individual' five times in the same sentence -- four times to refer to the victim of torture or extrajudicial killing, which could be only a natural person, and once to the perpetrator of the torture or killing." *Id.* at 8a-9a (citing § 1350 note § 2(a)). "The Rahims advance no cogent reason, and we see none, to think the term 'individual' has a different meaning when referring to the victim as opposed to the perpetrator." *Id.* at 9a.

Having concluded that "individual" cannot be construed to apply to the Palestinian Authority or PLO, the court of appeals did not reach whether the Rahim Family could satisfy the state action requirement.

REASONS FOR DENYING THE PETITION

I. The Eleventh Circuit's Decisions – Which Merely Assume Without Analysis that Corporations May Be Sued Under the TVPA – Do Not Create a Circuit Conflict Warranting This Court's Review.

"A petition for a writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. Here, petitioners argue that the decision of the D.C. Circuit directly conflicts with a decision of the Eleventh Circuit on a matter of substantial importance. Pet. 8-9.[1] The petition fails to acknowledge a recent Ninth Circuit decision on the question presented, which reached the same conclusion as the D.C. Circuit here. *Bowoto v. Chevron Corp.*, 621 F.3d 1116 (9th Cir. 2010) (holding that the TVPA allows suit against natural persons only), *petition for cert filed*, No. 10-1536 (June 20, 2011). In contrast to the decisions of the Ninth and D.C. Circuits, the Eleventh Circuit decisions petitioners cite include no analysis of the TVPA corporate liability issue or the relevant statutory text. The Eleventh Circuit's unexamined assumption that non-natural persons may be sued under the TVPA does not create a sufficiently well-

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[1] In *Doe v. Exxon Mobil Corp.*, ___ F.3d ___, 2011 U.S. App. LEXIS 13934, at *135-36 (D.C. Cir. Jul. 8, 2011), the D.C. Circuit again held that only natural persons are liable under the TVPA, and affirmed dismissal of the TVPA claims against the corporate defendant).

developed circuit conflict to merit the Court's exercise of its discretionary jurisdiction.

A. The Eleventh Circuit Has Not Squarely Addressed the Meaning of "Individual" Under the TVPA.

The petition asserts without elaboration that "the Eleventh Circuit has explicitly held that a TVPA action may be brought against an organizational defendant." Pet. 8. Petitioners then cite a district court decision (*Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp. 2d 1345, 1359 (S.D. Fla. 2003), *aff'd*, 578 F.3d 1252 (11th Cir. 2009)), and *Romero v. Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008). Pet. 9. In both cases, however, the court of appeals affirmed the dismissal of the TVPA claims. In neither case did the Eleventh Circuit analyze whether the term "individual," as used in the TVPA, applies to corporate or other organizational defendants. Rather both *Sinaltrainal* and *Romero* erroneously assumed that the Eleventh Circuit's earlier precedent had extended TVPA liability to corporations.

1. In *Romero*, the plaintiffs' TVPA claims were dismissed when the district court granted a motion for partial summary judgment. 552 F.3d at 1312-13. The Eleventh Circuit affirmed on the ground that plaintiffs failed to establish the requisite evidence of state action. *Id.* at 1316-18. The defendants had also argued on appeal that the district court lacked subject matter jurisdiction because the TVPA does not allow suits against corporations. The Eleventh Circuit rejected the characterization of corporate liability as a

jurisdictional question. *Id.* at 1315 (stating "when either the Alien Tort Statute or federal question statute provides jurisdiction, defects in pleading claims under the Torture Act are not jurisdictional defects"). In dicta, the court then observed:

> Even if we agreed with Drummond that its argument about corporate liability under the Torture Act was jurisdictional, we would be bound to reject that argument. Under the law of this Circuit, the Torture Act allows suits against corporate defendants. We held that a complaint, under the Act, stated a claim against a corporate defendant in *Aldana v. Del Monte Fresh Produce, Inc.*, 416 F.3d 1242 (11th Cir. 2005), and we are bound by that precedent.

Romero contains no further discussion of corporate liability under the TVPA. Having determined, relying solely on *Aldana*, that the district court had subject matter jurisdiction over the TVPA claim, the court of appeals nonetheless affirmed dismissal because the TVPA's state action requirement was not met. *Id.* at 1318. Significantly, petitioners, though relying on *Romero* for the circuit split, fail to even cite *Aldana*, *see* Pet. 8-9, perhaps because *Aldana* does not reach the holding *Romero* attributes to it.

2. In *Aldana*, the Eleventh Circuit never considered whether corporations could be sued under the TVPA. There, the threshold question was whether plaintiffs could raise separate claims for state-sponsored torture under the Alien Tort Statute and also under the TVPA. *Aldana v. Del Monte Fresh Produce, Inc.*, 416 F.3d 1242, 1250 (11th Cir.

2005). Having resolved that question in the affirmative, the Eleventh Circuit then addressed whether the acts alleged in the complaint can be considered "torture" under the TVPA's statutory definition. *Id.* at 1251. As to that issue, the court concluded that "Plaintiffs alleged sufficient facts to establish torture causing severe mental suffering" under the TVPA. *Id.* at 1251-53. The court accordingly vacated the district court's dismissal of the plaintiffs' TVPA clam as to that form of alleged torture. *Id.* at 1253.

Although the meaning of "torture" was before the Eleventh Circuit in *Aldana*, the issue of what types of defendants constitute an "individual" was not before the court. The corporate liability issue was not raised in the defendants-appellees' brief.[2] Because, in a TVPA suit, the issue of corporate liability does not implicate the court's subject matter jurisdiction, the court had no reason to raise the issue *sua sponte*.

The fact that *Aldana* vacated a TVPA dismissal as to a corporate defendant on grounds other than the corporate liability issue cannot be construed as establishing binding precedent that the TVPA authorizes suits against non-natural persons. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58 (1989). In *Will*, the petitioner had cited a number of Supreme Court cases that petitioner characterized as assuming that a State is a "person" for purposes

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[2] *See* Appellees' Answer Brief, *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, No. 04-10234, 2004 WL 4976697 (11th Cir. May 17, 2004).

of 42 U.S.C. § 1983, including cases in which a State had been sued by name under § 1983. *See id.* at 63 n.4. Rejecting these arguments, the Court stated: "But the Court did not address the meaning of person in any of those cases, and in none of the cases was resolution of that issue necessary to the decision." *Id.* The Court noted that "Petitioner's argument evidently rests on the proposition that whether a State is a person under § 1983 is 'jurisdictional' and 'thus could have been raised by the Court on its own motion' in those cases." *Id.* The Court then concluded: "Even assuming that petitioner's premise and characterization of the cases is correct, this Court has never considered itself bound [by prior *sub silentio* holdings] when a subsequent case finally brings the jurisdictional issue before us." *Id.* (internal citation and quotation omitted).

Similarly, because it did not address the meaning of "individual" under the TVPA, the *Aldana* decision should not be treated as binding precedent in the Eleventh Circuit on the question of TVPA corporate liability. *See Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1280 (11th Cir. 1999) (unlitigated issues "'are not to be considered as having been so decided as to constitute precedents'") (quoting *Webster v. Fall*, 266 U.S. 507, 511 (1925)). Thus, *Aldana* does not give rise to a well-developed circuit split necessitating the Court's attention.

3. Nor is the requisite "clear conflict between the circuits," Pet. 9, created by the Eleventh Circuit's affirmance in *Sinaltrainal*, the other case on which petitioners rely. In that case, the court of appeals

affirmed the district court's dismissal of the TVPA claim for failure to plead state action. 578 F.3d 1252, 1269-70 (11th Cir. 2009). The only discussion of corporate liability under the TVPA appears in a footnote, where the court states: "This Court has determined 'an individual' to whom liability may attach under the TVPA also includes a corporate defendant. *See Romero*, 552 F.3d at 1315 ('Under the law of this Circuit, the Torture Act allows suits against corporate defendants.'))." *Sinaltrainal*, 578 F.3d at 1264 n.13.

Thus, petitioners' circuit split rests on dicta in *Romero* and *Sinaltrainal* that the *Aldana* precedent compels extending liability to corporate defendants. In fact, *Aldana*, does not establish such a precedent. Moreover, because *Romero* and *Sinaltrainal* affirmed dismissal of the TVPA claims, the Eleventh Circuit did not need to reach the issue of corporate liability. When the question of corporate liability is squarely presented to the Eleventh Circuit, it will have an opportunity to consider the issue and may reach a conclusion consistent with that of the Ninth and D.C. Circuits. Until then, it is premature to treat the conflict between the Eleventh Circuit and the Ninth / D.C. Circuits as a compelling reason for granting the petition.

B. The Remedial Nature of the TVPA Does Not Provide a Compelling Reason for Certiorari.

The petition describes the question presented as one of "[s]ubstantial [i]mportance." Pet. 9. Petitioners note that the TVPA is a remedial statute, assert that a remedial statute "should not be

radically circumscribed by the decision of a lower court," and then conclude that "this Court, and this Court alone, should determine whether the TVPA does not permit suits against organizational defendants." *Id.* at 9-10.

The two courts of appeals that have substantively analyzed the question (the Ninth Circuit in *Bowoto* and the D.C. Circuit here) have concluded that the statute was not intended to reach organizational defendants. Petitioners' conclusion that those courts "radically circumscribed" the TVPA is both inconsistent with the plain meaning of the statutory text and finds no support in the legislative history.

In any event, an issue does not become a "[m]atter of [s]ubstantial [i]mportance" (Pet. 9) requiring this Court's review whenever the petitioner disagrees with the court of appeals' interpretation of a remedial statute. Nor does the fact that the TVPA reaches torture and extrajudicial killing change the analysis. *See id.* at 10.

In fact, because the TVPA creates a cause of action against foreign defendants (here, the governing authority in one of the most diplomatically sensitive areas of the world) for specific international law violations occurring outside the U.S., its extraterritorial reach should not be expanded to include additional categories of defendants (such as corporations and political organizations) absent clear intent from Congress, which is lacking here *Cf. Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004) ("the potential implications for the foreign relations of the United States of recognizing private causes of action for violating

international law should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs").

C. A Circuit Split on Alien Tort Statute Corporate Liability Does Not Establish the Requisite Circuit Split on the Question Presented Here.

Perhaps recognizing the tenuous nature of the circuit conflict on TVPA corporate liability, petitioners attempt to ride the coattails of another circuit split regarding the question of corporate liability under the Alien Tort Statute. *See* Pet. 10 (citing petition filed in *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491). Petitioners assert that, "if this Court grants certiorari in the *Kiobel* matter it should grant the instant Petition a well." Pet. 10. As grounds for this linkage, petitioners only vaguely assert that "the scope of the ATS and the TVPA in respect to organizational defendants cannot and should not be examined in a vacuum." *Id.*

Unlike the Alien Tort State, however, which confers jurisdiction over certain violations of customary rules of international law, the scope of liability under the TVPA is determined by statute. Because the plain meaning of the statutory text of the TVPA precludes suits against corporations, Congress has made clear that -- as to claims of torture and extrajudicial killing under color of foreign law -- only natural persons may be sued. *Cf. Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004) ("a decision to create a private right of action is one left to legislative judgment in the great majority of

cases"). Whether customary norms of international law allow suits against corporations for other types of international law violations and whether the Alien Tort Statute provides a basis for exercising jurisdiction over those claims is not relevant to resolution of the question presented here.

II. The Petitioners' Failure to Satisfy the TVPA's State Action Requirement Provides an Alternate Ground for Affirmance, Making This a Poor Vehicle for Review of the Question Presented.

Where, as here, the judgment may be affirmed on an alternate ground without deciding the question presented, certiorari is not warranted. *See* Eugene Gressman, et al., *Supreme Court Practice* 248 (9th ed. 2007). Here, the dismissal of the Rahim Family's claim can be affirmed on the independent ground -- argued below but not addressed by either the district court or the D.C. Circuit -- that the claim failed to satisfy the TVPA's state action requirement.

The TVPA imposes liability only where an individual commits the torture or extrajudicial killing "under actual or apparent authority, or color of law, *of any foreign nation*." 28 U.S.C. § 1350 note § 2(a) (emphasis added). Courts previously have held that the Palestinian Authority and PLO are not immune from suit under the Anti-Terrorism Act, 18 U.S.C. § 2333, because Palestine is not yet a "foreign state." *See, e.g.*, *Ungar v. PLO*, 402 F.3d 274, 289 (1st Cir. 2005). Throughout the litigation, the Rahim Family readily conceded that neither the Palestinian Authority nor PLO is a foreign state. *See* Rahim C.A. Br. at 12 ("the Rahim Family - and

every court to have considered the issue - agree that neither the PA no[r] PLO is a foreign state"). In the absence of a state, there can be no state action or, in the TVPA's nomenclature, action "under actual or apparent authority, or color of law, of any foreign nation."

Moreover, if the Palestinian Authority is treated as a "foreign nation" for purposes of the TVPA, then it is immune from suit. *See* H.R. Rep. No. 102-367, at 4 (1991), reprinted in 1992 U.S.C.C.A.N. 84, 87 ("Only 'individuals,' not foreign states, can be sued under the [TVPA]."); S. Rep. No. 102-249, 1991 WL 258662, at *6-7 (1991) ("Consequently, the TVPA is not meant to override the Foreign Sovereign Immunities Act . . . which renders foreign governments immune from suits in U.S. courts, except in certain circumstances.").

Because the dismissal of the Rahim Family's TVPA claim can be affirmed on the state action ground, without addressing whether "individual" encompasses organizational defendants, this case presents an unsuitable vehicle for addressing the question presented.

If the Rahim Family's petition were granted, the Court should also review the alternative argument the Palestinian Authority and PLO raised below: whether the unidentified PA employees who allegedly carried out the torture and extrajudicial killing acted "under actual or apparent authority, or color of law, of any foreign nation." *See* 28 U.S.C. § 1350 note § 2(a).

III. The D.C. Circuit's Holding Is Correct

This Court's review is unwarranted for the additional reason that the D.C. Circuit's holding is correct.

A. The D.C. Circuit's Decision Is Consistent with the Ordinary Meaning of "Individual" and with the Term's Use Elsewhere in the Statute.

TVPA liability may be imposed only on "[a]n *individual* who, under actual or apparent authority, or color of law, of any foreign nation . . . subjects an *individual*" to torture or extrajudicial killing. 28 U.S.C. § 1350 note § 2(a) (emphasis added).

Petitioners argue that the D.C. Circuit incorrectly interpreted "individual" to apply only to natural persons and not to organizational defendants. Pet. 10-13. In lieu of argument, the petition includes a lengthy excerpt from the district court's decision in *Sinaltrainal v. Coca-Cola Co.*, 256 F. Supp. 2d 1345 (S.D. Fla. 2003), *aff'd*, 578 F.3d 1252 (11th Cir. 2009). *See* Pet. 11-12. As discussed below, that decision, in addition to being inconsistent with the majority of courts that have analyzed the question, is based on a misinterpretation of the Court's decision in *Clinton v. City of New York*, 524 U.S. 417 (1998), and an untenable inference drawn from the legislative history.

1. The term "individual" is not defined in the TVPA, but in ordinary usage refers to a natural person and in legal terminology generally has a narrower meaning than "person." In the Dictionary

Act, Congress provided definitions for a number of common statutory terms that courts are to apply "unless the context indicates otherwise." *See* 1 U.S.C. § 1. The Act defines "person" to include "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." *Id.* The Dictionary Act therefore speaks of "corporations" and "individuals" as distinct terms, creating a presumption that those terms have different meanings. *See Bowoto v. Chevron Corp.*, 621 F.3d 1116, 1127 (9th Cir. 2010); Pet. App. 7a-8a. Moreover, courts regularly distinguish between "individuals" and "corporations." *See, e.g., Goodyear Dunlop Tires Operations v. Brown*, 131 S. Ct. 2846, 2853-54 (2011) ("For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home.").

In *Clinton v. City of New York*, 524 US. 417 (1998), the Court recognized that, "in ordinary usage both 'individual' and 'person' often refer to an individual human being." *Id.* at 428 n.13 (citing Webster's Third New International Dictionary 1152, 1686 (1986)). The term "person," however "often has a broader meaning in the law." *Id.* (citing 1 U.S.C. § 1) (Dictionary Act definition of "person").

Petitioners cite *Clinton* as "holding that 'individual' is synonymous with 'person'" and then argue that "individual" in the TVPA can be construed to include corporations and other organizational defendants. Pet. 13. *See also id.* at

12 (quoting *Sinaltrainal's* discussion of *Clinton*). The Court, however, treated the terms as synonymous only as to their ordinary usage, in which both terms often refer to an individual human being. 524 U.S. at 428 n.13. With respect to their usage in legal terminology, the court distinguished between "person" and "individual," noting that "'person' often has a broader meaning in the law," and can encompass corporations. *Id.*

Clinton interpreted "individual," as it appeared in 2 U.S.C. § 692(a)(1), which allows individuals adversely affected by a line item veto to bring a declaratory judgment action. Although the Court ultimately concluded that "individual" for purposes of § 692 applied to non-natural persons, the Court emphasized the uniqueness of its holding, noting that "the structure of § 692 makes it clear that Congress believed the [line item veto] issue warranted expedited review and, therefore, that Congress did not intend the result that the word 'individual' would dictate in other contexts." *Id.* at 429 n.14.

2. Here, the structure of the TVPA confirms that "individual" was intended to refer to natural persons only. The statute's use of "individual" in the same sentence to describe both the perpetrator and the victim compels interpreting "individual" to apply only to natural persons, because only natural persons can be subject to torture or extrajudicial killing. "Individual" should not be given one meaning within the statute when referring to the perpetrator and an entirely different meaning when referring to the victim. *See Desert Palace, Inc. v.*

Costa, 539 U.S. 90, 101 (2003) (noting that "[a]bsent some congressional indication to the contrary, [courts] decline to give the same term in the same Act a different meaning depending on whether the rights of the plaintiff or the defendant are at issue").

Indeed, it is a "normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." *Sullivan v. Stroop*, 496 U.S. 478, 484 (1990) (internal quotation marks omitted). Here, "individual" is used to refer to both perpetrator and victim in the same sentence, making a particularly compelling case for giving the term a consistent meaning.

3. In *Sinaltrainal*, the district court decision on which petitioners rely, the court treated the absence of an express statement of intent to exempt corporations in the legislative history as supporting an inference that Congress intended them to be sued. Pet. 12 (quoting 256 F. Supp. 2d at 1358-59). Given (i) the ordinary meaning of "individual," (ii) the fact that Congress used the term "individual" rather than "person," and (3) "individual" is used elsewhere in the same sentence to refer to natural persons only, there is no ambiguity in the statutory text requiring resort to legislative history.

In any event, the legislative history does not support an inference that Congress intended to impose liability on corporations. As the Ninth Circuit noted in *Bowoto*, "[n]either the Senate nor House report . . . even hint at corporate liability." *Bowoto v. Chevron Corp.*, 621 F.3d 1116, 1127 (9th Cir. 2010) (citing The Torture Victim Protection Act

of 1991, S. Rep. 102-249 (1991); Torture Victim Protection Act of 1991, H.R. Rep. 102-367 (1991)). Because Congress used the term "individual," not "person," silence in the legislative history is more properly viewed as creating an inference that Congress intended the ordinary usage of "individual" to apply. *See Bowoto*, 621 F.3d at 1127-28 ("Had Congress intended for the court to interpret the term 'individual' so broadly as to include corporations, it would have included some evidence of this intent in the legislative history.").[3]

B. The D.C. Circuit's Decision Does Not Undermine the Purpose of the TVPA.

Petitioners cite legislative history indicating that Congress enacted the TVPA to extend certain causes of action available to aliens under the Alien Tort Statute to plaintiffs who are U.S. citizens. Pet. 13. Petitioners then assert that, because two courts of appeals have held that Alien Tort Statute suits may

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[3] Moreover, a precursor to the TVPA would have imposed liability on any "person who, under actual or apparent authority of any foreign nation" subjected any other "person to torture or extrajudicial killing," H.R. 1417, 100th Cong. § 2 (as referred to the H. Comms. on Foreign Affairs and the Judiciary, Mar. 4, 1988). The House Foreign Affairs Committee amended the bill in June 1988 to replace the word "person" with "individual" to make clear that the bill applies "to individuals and not to corporations." *The Torture Victim Protection Act: Hearing and Markup before the H. Comm. on Foreign Affairs on H.R. 1417*, 100th Cong. 87-88 (1988). The TVPA ultimately was enacted without further discussion of substituting "individual" for "person." Pub. L. No. 102-256, 106 Stat. 73 (1992).

be brought against corporate defendants, the TVPA also must be construed to allow suits against corporate defendants. Pet. 13 (citing *Doe v. Exxon Mobil Corp.*, ___ F.3d ___, 2011 WL 2652384 (D.C. Cir. July 8, 2011); *Flomo v. Firestone Nat. Rubber Co., LLC*, ___ F.3d ___, 2011 WL 2675924 (7th Cir. July 11, 2011)). *But see Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), *petition for cert. filed*, No. 10-1491 (June 6, 2011) (holding that corporations may not be sued under the Alien Tort Statute).

At the time the TVPA was enacted, however, corporate liability under the Alien Tort Statute was not established. Indeed, the leading Alien Tort Statute case at the time, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), involved a suit against a former Paraguayan police official. *See* H.R. Rep No. 102-367, at 4, reprinted in 1992 U.S.C.C.A.N. at 84, 86 (discussing *Filartiga*). Congress enacted the TVPA to clarify that such suits could be brought in the United States, a proposition Judge Bork had called into question in his concurring opinion in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 103 (1985). *See* H.R. Rep. No. 102-367, at 4, reprinted in 1992 U.S.C.C.A.N. at 84, 86 ("Judge Bork questioned the existence of a private right of action under the Alien Tort Claims Act"). Thus, even assuming Congress intended the TVPA to mirror the Alien Tort Statute with respect to claims of torture or extrajudicial killing, there is no reason to believe Congress understood such a right of action to permit suits against organizational defendants. More importantly, given the plain meaning of the TVPA

statutory text, there is no basis for resort to drawing inferences from the legislative history.

Petitioners assert that it is "incongruous and unjust" that an alien can sue an organizational defendant under the Alien Tort Statute, but a U.S. citizen cannot. Pet. 13-14. This Court may ultimately conclude that corporations may not be sued under the Alien Tort Statute, eliminating any incongruity. But even if corporate liability becomes well-established under the Alien Tort Statute, decisions interpreting that statute cannot trump the express language Congress chose in limiting the TVPA to suits against individuals.

Moreover, petitioners' concerns regarding incongruity and injustice in treating alien plaintiffs differently than U.S. plaintiffs erroneously assumes that suits that could not be maintained under the TVPA could nonetheless proceed under the auspices of the Alien Tort Statute. The TVPA, however, should be viewed as providing the sole cause of action for claims alleging torture or extrajudicial killing under color of law of a foreign nation.

In *Sosa v. Alvarez-Machain*, the Court emphasized that a "decision to create a private right of action is one better left to legislative judgment in the great majority of cases." 542 U.S. 692, 727 (2004). With the TVPA, Congress legislated specific relief for victims of torture and extrajudicial killing. *See* H.R. Rep. No. 102-367 at 3, reprinted in 1992 U.S.C.C.A.N 84, 86 (explaining that the purpose of the statute is to provide "a clear and specific remedy, not limited to aliens, for torture and extrajudicial killing").

In enacting the TVPA, Congress considered whether the TVPA would entirely supplant the Alien Tort Statute. The House Report explains:

> Official torture and summary executions merit special attention in a statute expressly addressed to those practices. At the same time, claims based on torture or summary executions do not exhaust the list of actions that may appropriately be covered by section 1350. That statute should remain intact to permit suits *based on other norms* that already exist or may ripen in the future into rules of customary international law.

H.R. Rep No. 102-367, at 4, reprinted in, 1992 U.S.C.C.A.N. at 86 (emphasis added). The Senate Report contains similar language: "Official torture and summary executions merit special attention in a statute expressly addressed to those practices. At the same time, claims based on torture or summary executions do not exhaust the list of actions that may appropriately be covered by section 1350. Consequently, that statute should remain intact." S. Rep. No. 102-249, 1991 WL 258662, at *4 (1991).

Thus, Congress did not repeal the Alien Tort Statute, as it recognized that it would continue to serve as the basis for actions alleging international law violations other than torture and extrajudicial killing. But, for claims based on torture and extrajudicial killing, the legislative history expresses Congress' intent that the TVPA would provide the sole cause of action. As the Supreme Court noted, the TVPA provides a "clear [legislative] mandate" for

federal claims of torture. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 728 (2004).

In *Enahoro v. Abubakar*, the Seventh Circuit relied on the legislative history of the TVPA and the Supreme Court's reasoning in *Sosa* in holding that the TVPA "occup[ies] the field" with regard to torture and extrajudicial killing claims. 408 F.3d 877, 884-85 (7th Cir. 2005). As a result, the "cause of action Congress provided in the [TVPA] is the one which plaintiffs alleging torture or extrajudicial killing must plead," and there is no independent cause of action under the Alien Tort Statute. *Id.* at 885. Similarly, in *Corrie v. Caterpillar, Inc.*, another federal court held that the TVPA "provides the exclusive remedy for plaintiffs who allege extrajudicial killing under color of foreign law." 403 F. Supp. 2d 1019, 1025 (W.D. Wash. 2005), *aff'd on other grounds*, 503 F.3d 974 (9th Cir. 2007). *But see Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1251 (11th Cir. 2005) (holding that the TVPA does not preempt the Alien Tort Statute); *Shafi v. Palestinian Auth.*, 686 F. Supp. 2d 23, 27-28 (D.D.C. 2010) (same). *See also Doe v. Exxon Mobil Corp.*, ___ F.3d ___, 2011 U.S. App. LEXIS 13934, at *111-12 n.37 (D.C. Cir. Jul. 8, 2011) (noting that "Exxon has waived any argument that enactment of the TVPA preempted torture and extrajudicial killing claims under the [Alien Tort Statute] by raising the argument only in a conclusory footnote").

In sum, the D.C. Circuit's decision follows from the plain language of the TVPA and, in any event, is

consistent with the history and purpose of the statute.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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August 19, 2011

PETITIONER'S BRIEF

No. 11-88

IN THE

Supreme Court of the United States

ASID MOHAMAD ET AL.,

Petitioners,

v.

PALESTINIAN AUTHORITY AND PALESTINE LIBERATION ORGANIZATION,

Respondents.

On a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

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QUESTION PRESENTED

Whether the Torture Victim Protection Act, 28 U.S.C. § 1350 note, permits actions against defendants that are not natural persons.

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BRIEF FOR PETITIONERS

Petitioners Asid Mohamad, individually and for the estate of Azzam Rahim, deceased *et al.* respectfully request that this Court reverse the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The order of the United States Court of Appeals for the District of Columbia Circuit (Pet. App. 1a) is reported at 634 F.3d 604. The order of the United States District Court for the District of Columbia (Pet. App. 14a) is reported at 664 F. Supp. 2d 20.

JURISDICTION

The judgment of the court of appeals was entered on March 18, 2011. Pet. App. 1a. On June 17, 2011, the Chief Justice extended the time in which to file a petition for certiorari to July 15, 2011. No. 10A1244. Petitioners then filed a petition for a writ of certiorari on July 15, 2011, which this Court granted on October 17, 2011. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The Torture Victim Protection Act, codified as a note to Section 1350 of Title 28 of the United States Code, is reproduced in the Appendix to this brief.

STATEMENT OF THE CASE

Scarcely any acts are more reprehensible and universally condemned by all civilized nations than torture and extrajudicial killing. The Torture Victim Protection Act (TVPA) creates a tort action for victims of these heinous acts. The question presented here is whether the TVPA – in stark contrast to all of the other provisions in the U.S. Code creating tort actions, including those specifically relating to torture and extrajudicial killing – exempts from liability non-sovereign organizations responsible for such acts.

I. Legal Framework

The Torture Victim Protection Act (TVPA), 28 U.S.C. § 1350 note, is designed to provide meaningful remedies, as well as accountability and deterrence, with respect to the deplorable acts of torture and extrajudicial killing.

1. A fundamental precept of the law of nations is the prohibition against torture and extrajudicial killing. As is most relevant here, the United States is a party to the Geneva Conventions of 1949; the International Covenant on Civil and Political Rights (ICCPR), Dec. 16, 1966, 999 U.N.T.S. 171; and the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT), Dec. 10, 1984, 1465 U.N.T.S. 85. The Geneva Conventions and ICCPR proscribe (among other things) torture and extrajudicial killing, and the CAT strengthens the prohibitions against the former.

Several U.S. statutes implement these internationally recognized norms and obligations. For instance, 42 U.S.C. § 1983 provides a tort action

for American citizens tortured or extrajudicially killed under color of U.S. law. *See, e.g.*, Mem. for the United States as Amicus Curiae at 19, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (No. 79-6090), 1980 WL 340146. In addition, the Anti-Terrorism Act (ATA), 18 U.S.C. § 2333, permits victims of torture or extrajudicial killing perpetrated as acts of "international terrorism" (conducted on U.S. soil or abroad) to recover treble damages in tort actions. Both of these statutes allow plaintiffs to sue not only natural persons but also responsible organizations. *See Monell v. N.Y.C. Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978) (Section 1983); *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 701 (7th Cir. 2008) (en banc) (ATA).

2. The TVPA provides a similar tort action for American citizens and other victims, allowing them to recover damages for such acts perpetrated under color of foreign law. As the Act's preamble explains, this statute is designed "to carry out obligations of the United States under the United Nations Charter and other international agreements pertaining to the protection of human rights." Pub. L. No. 102-256, 106 Stat. 73 (1992).

Congress recognized that it was particularly important to reinforce these commitments to international human rights after the D.C. Circuit's decision in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984). *See* S. Rep. No. 102-249, at 4-5 (1991). In that case, plaintiffs had sued the Palestine Liberation Organization (PLO), along with other organizations and the state of Libya, under the Alien Tort Statute (ATS), 28 U.S.C. § 1350, for torture and extrajudicial killings perpetrated abroad.

Tel-Oren, 726 F.2d at 775. The *Tel-Oren* court did not question that non-sovereign organizations acting under color of law could be held liable for violations of the ATS. The court, however, refused on various other grounds (none of which commanded a majority) to allow the suit to proceed – most notably, on the ground that the ATS did not explicitly create a cause of action for torture or extrajudicial killing. *See Tel-Oren*, 726 F.2d at 799 (Bork, J., concurring).

Congress designed the TVPA to "provide [the explicit] grant" of a private right of action that Judge Bork said was lacking in *Tel-Oren*. S. Rep. No. 102-249, at 4-5; H.R. Rep. No. 102-367, at 4 (1991). In its liability provision, the TVPA states:

> An individual who, under actual or apparent authority, or color of law, of any foreign nation (1) subjects an individual to torture . . . or (2) subjects an individual to extrajudicial killing shall [be liable] in a civil action.

28 U.S.C. § 1350 note sec. 2(a). The statute defines "torture" and "extrajudicial killing" in the same terms as the international instruments barring such conduct. *Id.*

Congress did not, however, go so far in the TVPA as to create a new exception to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 *et seq.* Thus, as the Senate Report on the bill explained – in a section entitled "Who can be sued" – the TVPA refers to a defendant as an "individual" in order "to make crystal clear that foreign states or their entities cannot be sued under this bill." S. Rep. No. 102-249, at 7.

II. Factual And Procedural Background

1. Azzam Rahim was born in the West Bank village of Ein Yabroud, near Ramallah, and immigrated to the United States in the 1970s. He subsequently married in this country and had six U.S.-citizen children. Rahim also became an American citizen and was a successful businessman in the Dallas area.

In 1993, the Oslo Accords established the Palestinian Interim Self-Government Authority (now often known simply as the Palestinian Authority, or the PA). The Accords assigned the PA various functions akin to a municipal government, including police authority over parts of the West Bank. Declaration of Principles on Interim Self-Government Arrangements, Isr.-P.L.O., arts. I, VIII, Sept. 13, 1993, 32 I.L.M. 1525. Two years later, Rahim returned to the West Bank for an extended visit to his boyhood village.

About a month after his arrival, a group of men later identified as PA/PLO security police arrested Rahim at a coffee shop and forced him into an unmarked car. Two days later, an ambulance delivered Rahim's body to his family. The corpse was badly bruised, burned with cigarettes, and bore other marks of torture, including several broken bones.

The PA claimed that Rahim died of a heart attack. But the U.S. State Department issued a report on the incident, describing Rahim's death in a section entitled "Political and Other Extrajudicial Killing" and confirming that Rahim had died "in the custody of PA intelligence officers in Jericho." U.S. Dep't of State, 1995 OCCUPIED TERRITORIES HUMAN RIGHTS PRACTICES (1996).

2. Rahim's son Asid Mohamad, individually and as the representative of the Rahim estate, as well as other relatives, filed suit against the PLO and the PA in the U.S. District Court for the Southern District of New York, alleging that they were responsible for the torture and extrajudicial killing of Rahim.[1] These plaintiffs (petitioners in this Court) sought relief under the TVPA, in addition to other claims not at issue here.

After the PLO and the PA failed to answer the complaint, the district court entered a default judgment against them. Shortly thereafter, the PLO and the PA moved to vacate the entry of default and to dismiss the complaint for lack of personal jurisdiction, among other grounds.

In response, petitioners successfully moved to transfer the case to the U.S. District Court for the District of Columbia, which had previously exercised personal jurisdiction over respondents in other matters, and which did so again here. Respondents then moved to dismiss petitioners' TVPA claim on two non-jurisdictional grounds: (1) that the TVPA does not apply to organizational defendants; and (2) that, even if the TVPA applies to organizations, the particular organizations here did not act, as the TVPA requires, under apparent authority or color of law of a foreign nation.

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[1] Petitioners also named several natural persons as defendants. Due largely to difficulties in serving process, petitioners later voluntarily dismissed these defendants from the case.

The district court vacated the entry of default and dismissed the case. Expressly disagreeing with the only federal court of appeals to have addressed the subject at that time, *see Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1265 (11th Cir. 2005), the district court held that petitioners could not sue respondents under the TVPA because the term "individual" – which the TVPA uses to refer to a violator of the Act – "includes only human beings, and does not encompass" organizations. Pet. App. 17a-18a. (The court did not reach respondents' alternative "color of law" argument, which is not at issue here.)

3. The D.C. Circuit affirmed. It started from the assumption that the "ordinary meaning" of the term "individual" "typically encompasses only natural persons." Pet. App. 7a (quotation marks and citations omitted). At the same time, the court of appeals acknowledged that, where context and policy have rendered it appropriate, this Court and others have construed "individual" in other statutes to include organizations. Pet. App. 6a-7a (citing cases). Accordingly, the court of appeals looked beyond the language of the TVPA's liability provision. Citing other subsections of the TVPA and the Dictionary Act's definition of a different statutory term (the word "person"), the court of appeals concluded that these provisions "confirm[ed]" that the TVPA exempted organizations from liability. Pet. App. 8a.

The court of appeals did not attempt to explain how this construction of the TVPA was consistent with the statute's purpose. Nor did it offer any reason why Congress would have wanted the TVPA to have a more limited reach than other statutes

creating tort remedies for torture or extrajudicial killing – in fact, seemingly more limited than any other tort statute in the U.S. Code. Indeed, the court of appeals never mentioned the TVPA's legislative history or considered the Act's placement in the overall statutory and international scheme prohibiting torture and extrajudicial killing. Instead, in the court of appeals' view, the selected parts of the U.S. Code that it cited independently resolved the potential ambiguity in the TVPA's use of the word "individual[s]" to describe defendants. Pet. App. 8a-9a.

4. This Court granted certiorari. 132 S. Ct. ___ (2011).

SUMMARY OF ARGUMENT

The TVPA applies not only to natural persons but also to non-sovereign organizations responsible for torture and extrajudicial killings.

I. The text of the TVPA does not displace the ordinary presumption – otherwise apparently unbroken in the U.S. Code – that organizations are liable for the torts of their agents. The TVPA uses the word "individual" to describe violators of the Act – a term that, in ordinary usage, often refers to a human being. But as with the word "person," this Court and others have held that when used in legal parlance, the statutory term "individual" can include organizational entities. *See, e.g.*, *Clinton v. City of New York*, 524 U.S. 417, 428 (1998). Dictionaries confirm the point, and nothing in the Dictionary Act, 1 U.S.C. § 1, which does not even define the term "individual," rebuts it. If Congress had really wished to depart from the default rule of organizational liability, it would have limited the TVPA's reach to

"natural persons" or explicitly exempted organizational entities.

II. The context supplied by the structure and purpose of the TVPA confirms that the Act applies to organizations.

The TVPA incorporates ordinary principles of supervisory liability, under which a natural person may be held liable for torture or killings conducted by his subordinates. This shows that the TVPA's liability provision does not "specif[y]" any "intent" to depart from traditional agency principles. *See Meyer v. Holley*, 537 U.S. 280, 287 (2003). Instead, it embraces such principles. Nor, contrary to the court of appeals' supposition, does any other language in the TVPA evince a desire to abandon organizational liability. The TVPA's use of the word "individual" to refer to victims is unremarkable in light of the fact that many statutes use the same word to refer to plaintiffs and defendants where only one can be an entity. And the TVPA's use of the word "person" to refer to certain plaintiffs in extrajudicial killing cases does not create any useful contrast with the word "individual."

The TVPA's close relationship to other federal and international laws that proscribe, and provide remedies for, torture and extrajudicial killing reinforces that the Act incorporates the traditional rule of organizational liability. Every other federal statute proscribing torture or extrajudicial killing applies to organizations, and there is no reason for uniquely limiting the TVPA. International treaties that the TVPA implement are in accord. Each prohibits torture or extrajudicial killing by human beings and organizations alike. The TVPA would not

operate in harmony with those instruments if it exempted organizations from liability.

Limiting TVPA liability to natural persons also would thwart the Act's purposes. The Act, like other tort statutes, is designed to provide meaningful remedies to victims, as well as to deter the acts it proscribes and to hold perpetrators accountable. As a practical matter, those goals may be attained only if victims can sue organizations responsible for torture or extrajudicial killing. Organizations that perpetrate such reprehensible acts can be identified; U.S. court judgments can be enforced against them; and those judgments can affect their behavior and public standing. By contrast, it is extremely unlikely that victims will be able to identify specific people who tortured them abroad, obtain jurisdiction over them or their supervisors, and collect judgments from such people. The odds that the TVPA can achieve deterrence and accountability through lawsuits only against specific people are longer still. Even more so than with respect to a typical tort statute, therefore, only by reaching organizations can Congress's goals for the TVPA ever hope to be realized.

III. The TVPA's legislative history removes any remaining doubt that the Act applies to organizations. In a section entitled "Who can be sued," the Senate Report on the bill explains exactly why Congress used the word "individual" to refer to a violator of the Act: "The legislation uses the term 'individual' to make crystal clear that foreign states or their entities cannot be sued under this bill under any circumstances." S. Rep. No. 102-249, at 7 (1991). The House Report includes the same explanation. H.R. Rep. No. 102-367, at 4 (1991).

Obviously, this explanation contains no trace of any desire to depart from traditional liability principles. To the contrary, numerous other statements in these reports and throughout the proceedings leading up to the TVPA's enactment make plain that Congress fully expected the Act to apply to "organizations," "groups," and "death squads." Congress even noted that it was creating a cause of action that had been deemed missing in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984). The primary defendant in that case was one of the very respondents in this one: the PLO.

In short, there may be instances in which the meaning of a statutory term is so clear that only one outcome is possible. But this case is not one of them. And once one considers the language of the TVPA in context, and in light of Congress's explicit explanation of its word choice, the imperative of applying the Act not just to natural persons but also to non-sovereign organizations is inescapable.

ARGUMENT

The court of appeals construed the TVPA to do something seemingly unprecedented in federal law: create a tort action that categorically exempts organizations from liability for the acts of their agents. The text of the TVPA, however, does not dictate such a novel result. To the contrary, the TVPA, when read in the context of the statute's purpose and legislative history, compels the conclusion that the Act applies not only to natural persons but also to non-sovereign organizations.

I. The Text Of The TVPA Does Not Displace The Presumption That Non-Sovereign Organizations Are Liable For Their Torts.

The TVPA provides that "[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation (1) subjects an individual to torture . . . or (2) subjects an individual to extrajudicial killing shall [be liable] in a civil action." 28 U.S.C. § 1350 note sec. 2(a). The court of appeals acknowledged that while "[i]n common usage, 'individual' describes a natural person," Pet. App. 7a (quotation marks and citation omitted), this Court and others have construed that term in various statutes to encompass organizations, *id.* at 6a-7a (citing *Clinton v. City of New York*, 524 U.S. 417 (1998), and other cases). Yet the court of appeals still understated the degree to which the law presumes that the word "individual" in the context of a tort action can and should include organizations.

A. The Fact That The TVPA Creates A Tort Action Gives Rise To A Presumption That Organizations Are Liable For The Acts Of Their Agents.

The first critical aspect of the text of the TVPA is that it creates a tort action. As this Court has explained, "when Congress creates a tort action, it legislates against a legal background of ordinary tort-related . . . liability rules and consequently intends its legislation to incorporate those rules." *Meyer v. Holley*, 537 U.S. 280, 285 (2003). Thus, "where a common law principle is well established . . . the courts may take it as given that Congress has legislated with an expectation that the principle will apply except when a statutory purpose to the

contrary is evident." *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) (quotation marks and citations omitted); *accord Briscoe v. LaHue*, 460 U.S. 325, 330 (1983); *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952); *see also Staub v. Proctor Hosp.*, 131 S. Ct. 1186, 1191 (2011) (in construing the scope of liability, "we consult general principles of law, agency law, which form the background against which federal tort laws are enacted"); *Meyer*, 537 U.S. at 286 (elaborating the presumption against finding "unusual modification[s]" of "ordinary background tort principles").

It is "well settled" under U.S. law that organizations are liable in tort for the acts of their agents. *Balt. & Potomac R.R. v. Fifth Baptist Church*, 108 U.S. 317, 330 (1883); *see also Meyer*, 537 U.S. at 285-86; RESTATEMENT (THIRD) OF AGENCY § 7.03. Moreover, courts have long held that organizations are liable under common law and federal statutes not only for the negligent conduct of their agents, but for foreseeable violent or malicious conduct as well. *See, e.g.*, *Faragher v. City of Boca Raton*, 524 U.S. 775, 780 (1998) (municipal entity liable for sexual harassment committed by its employees); *Daniels v. Tearney*, 102 U.S. 415, 420 (1880) ("A corporation is liable for negligent and malicious torts, including . . . assault and battery . . . ."); *Lyon v. Carey*, 533 F.2d 649, 654 (D.C. Cir. 1976) (company liable for rape committed by its employee); *Estates of Ungar ex rel. Strachman v. Palestinian Auth.*, 325 F. Supp. 2d 15, 65-66 (D.R.I. 2004) (holding the PLO and the PA liable, as unincorporated associations, for the murder of an American citizen), *aff'd sub nom. Ungar v. Palestine*

Liberation Org., 402 F.3d 274 (1st Cir. 2005). Such liability ensures that victims can obtain meaningful remedies. It also effectuates deterrence and accountability by applying the law directly to responsible entities. *See* RESTATEMENT (SECOND) OF TORTS § 901.

Accordingly, even though federal statutes that create tort actions sometimes do not name organizations or other juridical entities as potential defendants, every such statute of which we are aware – from maritime tort regimes such as the Death on the High Seas Act (DOHSA), 46 U.S.C. § 30302, and the Jones Act, 46 U.S.C. § 30104, to the action for fraud in the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §§ 1692e, 1692k, to the action in 42 U.S.C. § 1985 for conspiracy to deprive someone of her civil rights – has been deemed to apply not only to natural persons but to organizations as well. *See Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 214-15 (1986) (DOHSA); *Karvelis v. Constellation Lines S.A.*, 806 F.2d 49, 52 (2d Cir. 1986) (Jones Act); *Volden v. Innovative Fin. Sys., Inc.*, 440 F.3d 947, 950-51 (8th Cir. 2006) (FDCPA); *Edmonds v. Dillin*, 485 F. Supp. 722, 729 (N.D. Ohio 1980) (Section 1985).

To be sure, some such statutes require heightened culpability beyond mere vicarious liability to hold organizations liable for acts of their agents. *See, e.g., Monell v. N.Y.C. Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978) (constitutional torts under 42

U.S.C. § 1983). But *none* exempts organizations entirely from liability for acts of their agents.[2]

Because the TVPA creates a domestic cause of action grounded in international norms, general presumptions in international law also may inform the backdrop against which the text of the statute should be read. It is a general principle of law common to nations that organizations are liable for the torts of their agents, including human rights abuses.[3] Thus, "[l]egal systems throughout the world recognize that corporate legal responsibility is part and parcel of the privilege of corporate personhood." *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 53 (D.C. Cir. 2011); *cf. First Nat'l City Bank v. Banco Para El*

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[2] Of course, the Second Circuit held in *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), *cert. granted*, 132 S. Ct. ___ (2011), that the Alien Tort Statute does not apply to corporations for certain violations of the law of nations. But that decision not only conflicts with the holdings of every other court of appeals to consider the issue; it also rests on customary international law considerations not necessarily relevant here, because the TVPA itself explicitly recognizes the causes of action at issue.

[3] General principles of law are a source of international law distinct from customary international law, and a background against which Congress's legislation should be understood. Statute of the International Court of Justice, art. 38, June 26, 1945, 59 Stat. 1055, T.S. No. 993 (1945); *see also Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 54 (D.C. Cir. 2011) ("Unlike the manner in which customary international law is recognized through common practice or usage out of a sense of legal obligation, a general principle becomes international law by its widespread application domestically by civilized nations.").

Comercio Exterior de Cuba, 462 U.S. 611, 628 n.20 (1983).[4]

Given the depth and force of this domestic and international presumption of organizational liability, it would be quite surprising for the TVPA to

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[4] Legal decisions holding organizations civilly liable under domestic laws that track the law of nations underscore the prevalence of this general principle. For example, from the earliest days of the common law, British courts have held whole ships, crews, and companies criminally and civilly accountable for violating the law of nations. *See, e.g.*, *Skinner v. East India Co.*, (1666) 6 State Trials 710 (H.L.), *vacated on other grounds*. This Court similarly has held whole crews and vessels liable for piracy, *see, e.g.*, *The Malek Adhel*, 43 U.S. (2 How.) 210 (1844), which is one of the oldest and clearest violations of the law of nations, *see Sosa v. Alvarez-Machain*, 542 U.S. 692, 716 (2004). The liability rules from the piracy context were extended in the nineteenth century to slave trading, one of the first international human rights prohibitions. *See, e.g.*, *The Slavers (Kate)*, 69 U.S. (2 Wall.) 350 (1864). Today, courts around the world continue to allow civil suits against organizations under domestic laws that are designed to track the law of nations. *See, e.g.*, *Association Canadienne contre l'Impunité v. Anvil Mining Ltd.*, 2011 (Superior Court of Quebec) 500-06-000530-101 (allowing case to proceed against mining company accused of assisting a massacre in the Democratic Republic of Congo); *Guerrero v. Monterrico Metals PLC*, [2010] EWHC 3228 (QB) (case against mining company accused of torturing protesters in Peru). The U.N. Security Council likewise regularly imposes sanctions against groups for violations of the law of nations. *See, e.g.*, S.C. Res. 1333, ¶ 5, U.N. Doc. S/RES/1333 (Dec. 19, 2000) (imposing sanctions on the Taliban in Afghanistan); S.C. Res. 1171, ¶ 5, U.N. Doc. S/RES/1171 (June 5, 1998) (imposing sanctions on the Revolutionary United Front, a militia with de facto control over territories in Sierra Leone); S.C. Res. 942, U.N. Doc. S/RES/942 (Sept. 23, 1994) (imposing sanctions on Serbian armed groups in Bosnia).

categorically exempt organizations from liability for the egregious acts that the statute covers. One could conceivably argue that the statute implicitly requires some sort of organizational fault beyond vicarious liability in order to trigger organizational liability. *Cf. Monell*, 436 U.S. at 694. But it would be a drastic break from tradition and precedent to construe the text of the TVPA to exempt organizations from liability – as the court of appeals' decision does – even if their agents violate the Act pursuant to an organization's explicit instructions, or policy or practice.

B. The TVPA's Use Of The Term "Individual" Comports With The Presumption That Organizations Are Liable For The Acts Of Their Agents.

Words that refer in common usage only to natural persons typically encompass organizational entities in the context of tort statutes. For instance, the terms "person" and "whoever" most naturally refer to human beings. But when used in the parlance of legal liability, they do not displace the presumption that organizations are liable for the acts of their agents. *See, e.g.*, *Monell*, 436 U.S. at 690 ("persons" to whom 42 U.S.C. § 1983 applies include municipalities and other local government units); *United States v. A&P Trucking Co.*, 358 U.S. 121, 123 (1958) ("whoever" includes entities). The same is true of the term "individual."

1. While dictionaries state that the term "individual," like the term "person," often denotes a human being, they also indicate that another accepted usage of the word "individual" includes non-natural entities. At the time of the TVPA's

enactment, Black's Law Dictionary defined "individual" to mean "a private or natural person," but clarified that "this restrictive signification is not necessarily inherent in the word," and that "individual" may, "in proper cases, include artificial persons." BLACK'S LAW DICTIONARY 773 (6th ed. 1990).

Non-legal dictionaries similarly reflect this range of meanings. The edition of Webster's Dictionary in print at the time of the TVPA's enactment defined "individual" – in the first of its five listings – to mean "a single or particular being or thing or *group of beings or things*." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1152 (unabridged ed. 1986) (emphasis added). Other dictionaries contained similar guidance. *See* 7 OXFORD ENGLISH DICTIONARY 879-80 (unabridged 2d ed. 1989) (defining "individual" as "a single object or thing . . . regarded as a unit," and providing as an example of usage the sentence "[i]t makes no difference whether the individual be a numerical unit, or an aggregate unit, as a partnership, company, or corporation"); RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 974 (unabridged 2d ed. 1987) (defining "individual" as "a group considered as a unit"); WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY 932-33 (unabridged 2d ed. 1979) (defining "individual" as "a single being or thing of any kind; a single group when taken as a unit"). All of these definitions frame the term "individual" in distinctly non-human terms, instead placing their emphases on the *oneness* of something. Accordingly, the definitions comfortably encompass distinct organizations such as the PLO and the PA.

2. As with the terms "person" and "whoever," courts have interpreted the term "individual" in various provisions of the U.S. Code to include artificial entities. In *Clinton v. City of New York*, 524 U.S. 417 (1998), this Court construed the term "individual" in the Line Item Veto Act to encompass artificial entities (in that case, a municipality, labor unions, and a farmers' cooperative). Section 692(a)(1) of that Act expressly authorized "'[a]ny Member of Congress or any individual adversely affected' by the Act to bring an action for declaratory judgment or injunctive relief on the ground that any provision of the Act is unconstitutional." *Id.* at 428 (alteration in original) (quoting 2 U.S.C. § 692(a)(1)). This Court explained that "in the context of the entire section Congress undoubtedly intended the word 'individual' to be construed as synonymous with the word 'person.'" *Id.* "There is no plausible reason," the Court went on, "why Congress would have intended to provide for such special treatment of actions filed by natural persons and to have precluded entirely jurisdiction over comparable cases brought by corporate persons." *Id.* at 429.

Federal courts of appeals likewise have construed the term "individual" in other federal statutes to include organizations. *See United States v. Middleton*, 231 F.3d 1207, 1210 (9th Cir. 2000) ("Defendant reasons that, if Congress had intended [18 U.S.C.] § 1030(a)(5)(A) to cover damage to corporations, Congress would have used the word 'persons,' not 'individuals.' For several reasons, we are not persuaded."); *see also United States v. Perry*, 479 F.3d 885, 893 n.10 (D.C. Cir. 2007) (same statute: "[t]he parties agreed that 'individuals' include 'both natural persons and governmental agencies.'

. . . [B]oth 'individual' and 'person' are often defined more broadly in statutes"); *In re Atl. Bus. & Cmty. Corp.*, 901 F. 2d 325, 329 (3d Cir. 1990) ("Although [11 U.S.C.] Section 362(h) refers to an individual, the section has uniformly been held to be applicable to a corporate debtor."); *Budget Serv. Co. v. Better Homes of Va., Inc.*, 804 F.2d 289, 292 (4th Cir. 1986) (same statute: "a narrow construction of the term ['individual' in 11 U.S.C. § 362(h)] would defeat much of the purpose of the section, and we construe the word 'individual' to include a corporate debtor").

3. It is of no moment that the word "individual" does not have the same legal pedigree of accumulated meaning as the word "person." In common usage, the words are employed interchangeably; if anything, the term "individual" carries even less connotation of humanness than the term "person." And as this Court recognized in *Clinton*, these two terms can be construed synonymously in a statutory context. *See* 524 U.S. at 428.

Moreover, using the word "person" instead of "individual" in the TVPA could have created confusion – especially in light of the Act's "color of foreign law" requirement – because this Court has held that the term "person" can include foreign states. *See Pfizer, Inc. v. Gov't of India*, 434 U.S. 308, 320 (1978) (holding that foreign states are "persons" entitled to bring suit under the Sherman and Clayton Acts). "Individual," on the other hand, more clearly excludes states, but still encompasses other non-natural entities. For example, in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984) – the case that prompted Congress to enact the TVPA, *see supra* at 3-4 – Judge Edwards used the word

"individuals" to refer to non-sovereign "persons or groups" upon which U.S. law might impose liability for violations of international norms. *Tel-Oren*, 726 F.2d at 792 (concurring opinion). Using the term "individual" thus steers clear of potential confusion, making "crystal clear" – as the Senate Report on the bill explained – "that foreign states or their entities cannot be sued under the TVPA." S. Rep. No. 102-249, at 7 (1991); *see also infra* at 43-44.

4. Lest there be any doubt, if Congress really had intended to depart from traditional liability rules and limit the TVPA's reach to natural persons, it had at least two simple and clear means at its disposal.

First, Congress has often used the phrase "natural person" to exclude non-natural entities such as organizations from the terms of a statute. *See, e.g.*, 15 U.S.C. § 1693a(5) ("[T]he term 'consumer' means a natural person."); 15 U.S.C. § 6602(5) ("The term 'personal injury' means physical injury to a natural person."); 7 U.S.C. § 21(b)(4) (specifying that an applicant for registration as a futures association must adopt rules providing that without approval "no person shall become a member and no natural person shall become a person associated with a member"); 12 U.S.C. § 611 ("Corporations to be organized for the purpose of engaging in international or foreign banking . . . may be formed by any number of natural persons, not less in any case than five . . . .").

Second, Congress has expressly excluded organizational entities from liability under specified circumstances. For instance, the Norris-LaGuardia Act provides that "no association or organization participating or interested in a labor dispute, shall be held responsible or liable . . . for the unlawful acts of

individual officers, members, or agents," except upon clear proof of actual participation in, or authorization or ratification of, the acts at issue. 29 U.S.C. § 106.

If Congress had wished to limit TVPA liability to natural persons and to exclude organizations from its reach, Congress could easily have taken either of these steps. Yet it took neither, implicitly reinforcing that all it meant the word "individual" to accomplish was to exclude sovereign entities.

C. The Dictionary Act's Definition Of The Term "Person" Has Minimal Bearing On The Meaning Of The TVPA's Term "Individual."

The Dictionary Act, 1 U.S.C. § 1, does not define the word "individual." The court of appeals nonetheless deemed that Act relevant because it defines the word "person" to include "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." *Id.* In the court's view, this definition "strongly implies" that the word "individual" in the TVPA "does not comprise organizations." Pet. App. 7a.

The court of appeals made far too much of this definition. There is no reason to believe that a member of Congress would have looked to the Dictionary Act's definition of "person" to understand the meaning of a different term ("individual") in the TVPA. Attempting to infer the scope of one word's meaning from its usage in defining another term is an exercise in conjecture.

To the extent, however, that the Dictionary Act's definition of "person" is relevant here, that section's

use of the word "individual" cannot be read to imply that the word "individual" in the TVPA excludes organizations. The court of appeals seemed to assume that "individual" cannot encompass an organizational entity because the word appears in a list of terms that includes other words encompassing such entities. *See* Pet. App. 7a. But that makes little sense, for the terms in the Dictionary Act's definition of "person" obviously overlap to a substantial degree. For example, a law firm can simultaneously be several of the things that constitute a "person": a "corporation," a "company," an "association," a "firm," a "partnership," and "an individual." *See* 1 U.S.C. § 1. What is more, the Dictionary Act sometimes defines words with strings of terms whose meanings not only overlap with, but fully duplicate, the word being defined. For instance, it defines "insane person" to include "every idiot, lunatic, insane person, and person non compos mentis." *Id.* The purpose of the Dictionary Act, in short, is to make clear that certain specified statutory terms should be construed broadly, not to restrict the scope of other words.

At any rate, even when the Dictionary Act does actually define a word, the Act itself makes clear that its definition does not apply when "context indicates otherwise." *Id.* Thus, this Court has refused to apply the Act's definitions when an alternate definition is more suited to the context of a statute. *See, e.g.*, *Rowland v. Cal. Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194, 200-01 (1993). And this Court, as noted above, has held that the meaning of the term "individual" likewise depends on "the context of the entire section" and the statute's

objective. *Clinton*, 524 U.S. at 428. Accordingly, we now turn to a contextual analysis of the TVPA.

II. The Overall Structure And Purpose Of The TVPA Confirm That The Act Covers Organizations.

Statutory terms derive meaning not only from typical usage but also from their relationships to other statutory provisions and congressional policy. When this Court interprets a statute, therefore, it is "guided not by a single sentence or member of a sentence, but look[s] to the provisions of the whole law, and to its object and policy." *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 94-95 (1993) (quotation marks omitted).

Time and again, this Court has read potentially ambiguous statutory terms in alternative – even "uncommon" – ways when "ordinary or natural meaning[s]" of the terms would have stunted "the realization of clear congressional policy." *Johnson v. United States*, 529 U.S. 694, 706 n.9 (2000); *see also United States v. Tinklenberg*, 131 S. Ct. 2007, 2012 (2011) (departing from the ordinary meaning of "delay" due to "the context and in light of the statute's structure and purpose"); *Gonzales v. Carhart*, 550 U.S. 124, 152 (2007) ("ordinary meaning" does not control when "context requires a different result"); *Comm'r v. Brown*, 380 U.S. 563, 571 (1965) (departing from the "'literal or usual meaning of [a statute's] words'" in favor of a less common conception of the words is appropriate "'where acceptance of [the usual] meaning . . . would thwart the obvious purpose of the statute'") (quoting *Helvering v. Hammel*, 311 U.S. 504, 510-11 (1941)); *United States v. Am. Trucking Ass'ns*, 310 U.S. 534,

543-44 (1940) (courts should strive to avoid interpreting text to produce results "at variance with the policy of the legislation as a whole").

In light of this precedent, the court of appeals was properly open to the possibility that the "ordinary meaning" it ascribed to the word "individual" does not control the outcome here. Pet. App. 7a. But in looking beyond the word Congress used to refer to a violator of the TVPA, the court of appeals limited itself to consulting only certain internal structural aspects of the TVPA. *Id.* at 6a-9a. This analysis was incomplete and flawed on its own terms. A more comprehensive and careful examination of the TVPA reveals that it incorporates traditional agency principles, including organizational liability. Furthermore, a structural analysis of the TVPA's relationship to other domestic and international laws, coupled with an examination of its object and policy, dictates that the Act must apply to organizations.

A. The Structure Of The TVPA And Other Anti-Torture And Anti-Extrajudicial Killing Laws Shows That The TVPA Must Cover Organizations.

1. The structure of the TVPA demonstrates that it uses agency principles to establish its sphere of liability. The TVPA's liability provision states that an individual who "subjects" the victim to torture or extrajudicial killing shall be liable. 28 U.S.C. § 1350 note. Under this provision, it is undisputed that "a higher official need not have personally performed or ordered the abuses in order to be held liable" under the TVPA. S. Rep. No. 102-249, at 9 (1991). As the

Senate Report on the TVPA explains, and every court to confront the scenario has confirmed, "responsibility" under the Act "extends beyond the person or persons who actually committed those acts – anyone with higher authority who authorized, tolerated or knowingly ignored those acts is liable for them." *Id.*; *see also, e.g.*, *Chavez v. Carranza*, 559 F.3d 486, 499 (6th Cir. 2009) (upholding judgment against former head of Salvadoran Security Forces based on theory of "command responsibility"); *Ford ex rel. Estate of Ford v. Garcia*, 289 F.3d 1283, 1289 (11th Cir. 2002) (similarly approving the application of "command responsibility" jurisprudence in a TVPA case).

The TVPA's acceptance of supervisory liability shows that the TVPA's liability provision does not "specif[y]" any "intent" to depart from traditional agency principles. *See Meyer v. Holley*, 537 U.S. 280, 287 (2003); *see also supra* at 13 (to the extent Congress is silent, ordinary background tort principles prevail). To the contrary, it embraces such principles. Accordingly, the TVPA – like every other tort statute in the U.S. Code – must be deemed to incorporate the concept of organizational liability.

The court of appeals nevertheless advanced two structural rationales for concluding that the TVPA exempts organizations. Neither, however, withstands scrutiny.

First, the court of appeals noted that the TVPA uses the term "individual" to refer not only to the perpetrator of torture or extrajudicial killing but also to the victim of the torture or killing. Because a victim "could only be a natural person," the court of

appeals surmised that the perpetrator must likewise be a natural person. Pet. App. 8a-9a.

The court of appeals, however, read too much into the statute's multiple uses of the same word. As this Court has explained, "[m]ost words have different shades of meaning and consequently may be variously construed, not only when they occur in different statutes, but when used more than once in the same statute or even in the same section." *Envtl. Def. v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007) (alteration in original) (quoting *Atl. Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932)). Consequently, "[i]t is not unusual for the same word to be used with different meanings in the same act, and there is no rule of statutory construction which precludes the courts from giving to the word the meaning which the legislature intended it should have in each instance." *Atl. Cleaners*, 286 U.S. at 433. Any intuition that a single word has the same meaning each time it is used "'readily yields'" whenever the word is "'employed in different parts of the act with different intent.'" *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 595 (2004) (quoting *Atl. Cleaners*, 286 U.S. at 433); *see also, e.g.*, *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341-43 (1997) (the term "employee" in Title VII can encompass both current and former employees despite the fact that, elsewhere in Title VII, "the term 'employee' refers unambiguously to a current employee").

Numerous statutes illustrate this principle in circumstances similar to this case. For example, many statutes in which the offender can be an organization but the victim can only be human use

the same word, "person," to refer both to the offender and to the victim. Title 33 U.S.C. § 1319(c)(3)(A), for instance, penalizes any "person" who knows that, by violating certain provisions of that title, he places another "person" in imminent danger of death or serious bodily injury; the same subparagraph, meanwhile, provides heightened penalties for violations committed by "[a] person which is an organization." Likewise, 18 U.S.C. § 229F defines "person" to include various non-natural entities, while Section 229A – which relies on Section 229F's definition – provides specific penalties for violations that result in the death of a "person," which could only be a human being. Other examples abound. *See, e.g.*, *United States v. Weintraub*, 27 Fed. Appx. 54 (2d Cir. 2001) (affirming liability under 42 U.S.C. § 7413(c) for corporate defendants, where the statute provides that "[a]ny person who negligently [pollutes] . . . and who at the time negligently places another person in imminent danger of death or serious bodily injury" shall be punished by fine or imprisonment); *see also* 8 U.S.C. §§ 1101(b)(3), 1324 (Section 1324 sets penalties for a "person" who causes serious bodily injury to or endangers the life of "any person," where "person" is defined in Section 1101(b)(3) to include "an organization").

Similarly here, the fact that the TVPA uses the term "individual" to refer both to victims and perpetrators does not indicate that the term has identical meanings in both usages. Therefore, the fact that an "individual" who is a victim of torture or extrajudicial killing cannot be an organization has no bearing on whether an "individual" who is a perpetrator may be a non-natural entity.

Second, the court of appeals noted that subsection 2(a) of the TVPA uses the word "person" to refer to potential claimants besides legal representatives of the deceased who may bring wrongful death actions for extrajudicial killings. Pet. App. 9a. That being so, the court of appeals surmised (without any briefing on the subject) that the word "individual" must have a different, and narrower, meaning than "person" because "a claimant [in a wrongful death action] could be a non-natural person, such as the decedent's estate." *Id.*

The court of appeals' supposition about the meaning of "person" in this context is incorrect. The only legitimate claimants other than legal representatives of the deceased in wrongful death actions are natural persons – namely, relatives of the deceased. Stuart Speiser & James Rooks, RECOVERY FOR WRONGFUL DEATH §§ 3:1, 3:22 (4th ed. 2005); RESTATEMENT (SECOND) OF TORTS § 493 cmt. a. That means that an estate itself cannot be a claimant. Indeed, it has long been established that "the estate of a decedent is neither a person nor a corporation. It can neither sue nor be sued. It consists of property, or rights to property, the title of which passes on his death, with right of possession, according to the varying laws of the States, to executors of a will, administrators of estates, heirs or devisees, as the case may be." *Hess v. Reynolds*, 113 U.S. 73, 76 (1885). It also means that no useful contrast can be drawn between the TVPA's uses of "individual" and "person."

2. Other federal and international laws that proscribe, and provide remedies for, torture and extrajudicial killing all apply to organizations and

provide strong reason to conclude that the TVPA does as well.

a. It is a venerable principle of statutory construction that "if divers statutes relate to the same thing, they ought all to be taken into consideration in construing any one of them." *United States v. Freeman*, 44 U.S. (3 How.) 556, 564 (1845); *see also United States v. Stewart*, 311 U.S. 60, 64 (1940) (when statutes are "in pari materia," each statute "aids in ascertaining the meaning of the words as used in" the other statute). That being so, the TVPA should be read consistently with the three other federal statutes that provide civil remedies to American citizens who suffer torture or extrajudicial killing, each of which applies to organizations.

First, this Court has held that 42 U.S.C. § 1983 – which creates a tort action for torture or extrajudicial killings perpetrated under color of U.S. law,[5] and which Congress expressly expected "courts [to] look

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[5] 42 U.S.C. § 1983 provides in pertinent part: "Every person who, under color of [law] . . . subjects . . . any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the party injured . . . ." Because the Constitution prohibits torture, *e.g.*, *Estelle v. Gamble*, 429 U.S. 97, 102 (1976), the Government has acknowledged that Section 1983 provides a civil remedy for torture committed on U.S. soil. *See* Mem. for the United States as Amicus Curiae at 19, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (No. 79-6090), 1980 WL 340146; U.N. Comm. Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, at 25, U.N. Doc. CAT/C/48/Add.3 (June 29, 2005). Section 1983 likewise provides a remedy, via the Due Process Clause, for extrajudicial killing.

to" in construing the TVPA[6] – applies to organizations. *Monell v. N.Y.C. Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978); *see also Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288 (2001) (Section 1983 suit against an association). Indeed, the original intent of Section 1983 was to stop "'murder[,] . . . whippings and lynchings'" by an organization that operated with the approval and participation of certain state officials: the Ku Klux Klan. *Wilson v. Garcia*, 471 U.S. 261, 276 (1985) (quoting debates on the Civil Rights Act of 1871).

Second, the civil remedy provision of the Anti-Terrorism Act (ATA), 18 U.S.C. § 2333 – which was enacted shortly after the TVPA and provides a civil cause of action for treble damages for torture or extrajudicial killing perpetrated as acts of "international terrorism"[7] – applies to organizations.

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[6] The Senate Report explains that "[c]ourts should look to principles of liability under U.S. civil rights laws, in particular section 1983 of title 42 of the United States Code, in construing 'under color of law' as well as interpretations of 'actual or apparent authority' derived from agency theory in order to give the fullest coverage possible." S. Rep. No. 102-249, at 8 (1991); *see also Tachiona v. Mugabe*, 169 F. Supp. 2d 259, 316 (S.D.N.Y. 2001) (applying Section 1983 principles to construe "color of law" under the TVPA in a case against Zimbabwean President Robert Mugabe and his political party, ZANU-PF), *aff'd in part, rev'd in part sub nom. Tachiona v. United States*, 386 F.3d 205 (2d Cir. 2004).

[7] 18 U.S.C. § 2333 provides in pertinent part: "Any national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefor in any appropriate district court for the United States and shall

See, e.g., *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 701 (7th Cir. 2008) (en banc). Indeed, courts have specifically applied the ATA to the PLO and the PA. *See Ungar v. Palestine Liberation Org.*, 402 F.3d 274, 276 (1st Cir. 2005) (upholding ATA judgment against the PLO and the PA); *Biton v. Palestinian Interim Self-Gov't Auth.*, 239 F.R.D. 1, 5 (D.D.C. 2006) (same); *see also Estate of Klieman v. Palestinian Auth.*, 424 F. Supp. 2d 153, 168 (D.D.C. 2006) (allowing ATA suit to proceed against the PLO and the PA); *Gilmore v. Palestinian Interim Self-Gov't Auth.*, 422 F. Supp. 2d 96, 105 (D.D.C. 2006) (same); *Knox v. Palestine Liberation Org.*, 306 F. Supp. 2d 424, 426 (S.D.N.Y. 2004) (same).

Third, 28 U.S.C. § 1605A(c) – which provides a cause of action against designated state sponsors of terrorism and their agents for torture and extrajudicial killing (and which incorporates the TVPA's definitions of those terms) – applies not only to natural persons but also to entities.[8] Section 1605A(c) applies, first and foremost, to designated states themselves. *See, e.g.*, *Owens v. Republic of*

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recover threefold the damages he or she sustains and the cost of the suit, including attorney's fees."

[8] Section 1605A permits suits against a state sponsor of terrorism itself, which includes an "agency or instrumentality . . . [which] is a separate legal person, corporate or otherwise and is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state," 28 U.S.C. § 1603; or against "any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency." 28 U.S.C. § 1605A(c).

Sudan, ___ F. Supp. 2d ___, 2011 WL 5904614, at *4, *25 (D.D.C. Nov. 28, 2011) (entering judgment under Section 1605A against Sudan, Iran, and "the two major organizations through which Iran carries out its support of terrorism," the Iranian Revolutionary Guards Corps and the Iranian Ministry of Information and Security). In addition, non-sovereign organizations such as Hezbollah constitute state "agents" under the statute. *See Murphy v. Islamic Republic of Iran*, 740 F. Supp. 2d 51, 72 (D.D.C. 2010) ("Hezbollah, because it acted at the behest and under the operational control of defendants [Iran and its Ministry of Information and Security], acted as agents of defendants" within the meaning of Section 1605A(a)).

Construing the TVPA to exempt organizations from liability when their agents torture or extrajudicially kill people under color of foreign law would create a rift in this broader legislative framework. It would make no sense to subject organizations to liability for torture and extrajudicial killing when their agents act (1) under the color of U.S. law, (2) to further international terrorism, or (3) on behalf of terrorist states, but not when they perpetrate the same heinous actions against American citizens absent these other conditions yet under the color of foreign law.

Of course, the TVPA also is related to one more statute: the Alien Tort Statute (ATS), 28 U.S.C. § 1350. The ATS provides a grant of jurisdiction allowing non-citizens to recover for violations of the law of nations, *see Sosa v. Alvarez-Machain*, 542 U.S. 692, 712 (2004), which include torture and extrajudicial killing, *see Filartiga v. Pena-Irala*, 630

F.2d 876 (2d Cir. 1980). To the extent this Court holds (as it should) in *Kiobel v. Royal Dutch Petroleum Co.*, 132 S. Ct. ___ (No. 10-1491) that the ATS applies to organizations, that holding would only bolster the structural imperative to construe the TVPA the same way. It would be perverse to conclude that the U.S. Code provides greater remedies to non-citizen victims of torture or extrajudicial killing than to American citizens who suffer the same fate.

b. The TVPA not only fits within a framework of U.S. law, but Congress also designed it, as its preamble explains, "to carry out obligations of the United States under the United Nations Charter and other international agreements pertaining to the protection of human rights." Pub. L. No. 102-256, 106 Stat. 73 (1992). That being so, this Court should interpret the TVPA consistently with these agreements. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 436-40 (1987); *cf. Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (statutes should be construed to avoid conflicting with international law). Like the domestic statutes discussed above, these international treaties do not themselves compel relief under the precise circumstances here. But Congress did intend the TVPA to operate in harmony with them. And none of these treaties exempts organizations from liability for torture and extrajudicial killing committed by their agents.

The TVPA is designed to "carry out the intent of the Convention Against Torture." S. Rep. No. 102-249, at 3. Indeed, the TVPA borrows the CAT's definition of torture nearly verbatim. *Compare*

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1, Dec. 10, 1984, 1465 U.N.T.S. 85, *with* 28 U.S.C. § 1350 note sec. 3(b). Article 14 of the CAT provides that "each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation." *Id.* art. 14. This language emphasizes the need for redress and draws no distinctions among potential defendants.

Furthermore, the United Nations Committee Against Torture, which is charged with authoritatively interpreting the CAT, has made it clear that the CAT's definition of torture encompasses acts by organizations. *See Sadiq Shek Elmi v. Australia*, U.N. Comm. Against Torture Commc'n No. 120/1998, ¶ 6.8, U.N. Doc. CAT/C/22/D/120/1998 (May 25, 1999) (CAT covers torture committed by controlling factions like the Hawiye "clan" in Somalia); U.N. Comm. Against Torture, Gen. Cmt. No. 2, Implementation of Article 2 by States Parties, ¶ 15, U.N. Doc. CAT/C/GC/2 (Jan. 4, 2008) (noting that the CAT governs certain "[p]rivate contractors"). The federal courts of appeals likewise have held (in immigration cases implicating the CAT) that the treaty covers organizational acts. *See Ramirez-Peyro v. Holder*, 574 F.3d 893, 904-05 (8th Cir. 2009) (torture by drug "cartel" with consent or acquiescence by the Mexican government); *Delgado v. Mukasey*, 508 F.3d 702, 704, 708-09 (2d Cir. 2007) (torture by the FARC, "an anti-government terrorist organization" in Colombia); *Silva-Rengifo v. Attorney Gen.*, 473 F.3d 58, 65, 68-69 (3d Cir. 2007) (the CAT covers "persons or groups engaging in

torturous activity," including paramilitary groups and "certain [other] groups that engage in torture").[9]

Common Article 3 of the Geneva Conventions, which the TVPA also implements and tracks in its definition of "extrajudicial killing," *see* S. Rep. No. 102-249, at 6, expressly prohibits torture and extrajudicial killing "at any time and in any place whatsoever." This prohibition applies to "each party" in non-international armed conflicts. Common Article 3's prohibition on torture thus applies not only to states and natural persons, but also to non-sovereign organizations and armed groups. *See Kadic v. Karadzic*, 70 F.3d 232, 243 (2d Cir. 1995).

Finally, the International Covenant on Civil and Political Rights (ICCPR), another treaty to which the United States is a party, reinforces that organizations are not exempt from liability for torture and extrajudicial killing committed by their agents. The Covenant provides that "[n]o one shall be arbitrarily deprived of his life," and that "[n]o one

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[9] Before the United States ratified the CAT, the Senate issued a reservation claiming that Article 14 requires legal compensation only for torture committed within a signatory party's territory. Yet when the United States has issued periodic compliance reports to the Committee Against Torture, the Government has regularly cited the TVPA – which deals with torture committed abroad – as one of our nation's laws that satisfies our obligation under Article 14. *See* U.N. Comm. Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, at 26, U.N. Doc. CAT/C/48/Add.3 (June 29, 2005); U.N. Comm. Against Torture, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention, at 14, 61, U.N. Doc. CAT/C/28/Add.5 (Feb. 9, 2000).

shall be subjected to torture." International Covenant on Civil and Political Rights, arts. 6-7, Dec. 16, 1966, 999 U.N.T.S. 171. And the ICCPR makes clear that no "[s]tate, *group*, or person [has] any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein." *Id.* art. 5 (emphasis added). The ICCPR further requires each party to the treaty "[t]o ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity." *Id.* art. 2(3)(a); *see also* U.N. Human Rights Comm., Gen. Cmt. No. 31, [80], The Nature of the General Legal Obligation Imposed on State Parties to the Covenant [ICCPR], ¶ 8, U.N. Doc. CCPR/C/21/Rev.1/Add.13 (Mar. 29, 2004) (states must "redress the harm caused by such acts by private persons or *entities*") (emphasis added).

Given that all of these international treaties govern the conduct not only of natural persons but also of organizations, Congress logically understood that the TVPA would do the same. Otherwise, the Act would not be able to carry out its goal of furthering the intent of these treaties.

B. The Only Way To Fulfill The Purpose Of The TVPA Is To Apply The Act To Organizations.

The TVPA, like other tort statutes, seeks to provide meaningful remedies to victims, to hold wrongdoers accountable, and to deter the acts at issue. *See, e.g.*, *Tachiona v. Mugabe*, 169 F. Supp. 2d 259, 312 (S.D.N.Y. 2001), *aff'd in part, rev'd in part sub nom. Tachiona v. United States*, 386 F.3d 205 (2d

Cir. 2004). *See generally* RESTATEMENT (SECOND) OF TORTS § 901. In order for the Act to achieve these objectives, organizations must be subject to liability for torture and extrajudicial killings for which they are responsible. Indeed, practical considerations attendant to these kinds of cases render the TVPA the unlikeliest of candidates for dispensing with the rule of organizational liability.

1. The TVPA's foremost aim is to provide victims with remedies for torture and extrajudicial killing. *See* Pub. L. No. 102-256, 106 Stat. 73 (1992). And when a statute seeks to "creat[e] an effective remedy," this Court should avoid interpreting the statute to "thwart th[at] legislative purpose." *Agency Holding Corp. v. Malley-Duff Assocs.*, 483 U.S. 143, 154 (1987). Yet limiting liability under the TVPA to natural persons would preclude effective remedies for many victims in three different ways.

First, while victims usually can identify organizations responsible for their abuse, they usually cannot pinpoint the particular people who committed torture or extrajudicial killing. Individual torturers and their superiors do not wear identity badges or hand out business cards. On the contrary, they generally use aliases or disguise themselves in the presence of their victims, making it unlikely that a victim or her survivors will be able to identify the specific human beings who perpetrated the torture or execution. *See, e.g.*, Human Rights Watch, HARSH WAR, HARSH PEACE 23, 34, 45 (2010). A victim may never even have seen her torturers' faces if, for instance, she had a bag over her head while she endured beatings, shocks, or burns. Victims usually know, however, the organization that committed the

torture or extrajudicial killing. For example, while death squads formerly active in El Salvador took measures to protect the identities of those who pulled the trigger in mass shootings, they often carved their group's initials ("EM," for Escuadrón de la Muerte) into the chests of the corpses they left behind. *See* Bruce Campbell & Arthur Brenner, DEATH SQUADS IN GLOBAL PERSPECTIVE: MURDER WITH DENIABILITY 86-90 (2000).

Second, victims of torture and extrajudicial killing that took place abroad are more likely to be able to obtain personal jurisdiction in U.S. courts over organizational defendants than over specific human beings. Typically, transient ("tag") jurisdiction would be the only way of attaining personal jurisdiction over human beings who commit torture or extrajudicial killings abroad. *See Burnham v. Superior Court*, 495 U.S. 604 (1990). But it is unlikely that such people will try to travel to the United States within the TVPA's ten-year limitations period and put themselves in a situation where they could be served within the country. Even if they did try to enter the United States, it is unlikely they would be admitted into the country. And even if they did enter the country, it is unlikely that the victim would know about the visit sufficiently in advance to prepare and serve process.

It is much more plausible, therefore, that a torture victim will be able to secure general personal jurisdiction over a group through its contacts with the United States. *See Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952). Indeed, courts consistently have found foreign organizations – including the PLO and the PA – to have sufficient

contacts to support jurisdiction in the United States. *See Estates of Ungar ex rel. Strachman v. Palestinian Auth.*, 153 F. Supp. 2d 76, 86-95 (D.R.I. 2001) (exercising personal jurisdiction over the PLO and the PA in a case under 18 U.S.C. § 2333, but dismissing natural persons for lack of personal jurisdiction); *Biton v. Palestinian Interim Self-Gov't Auth.*, 310 F. Supp. 2d 172, 177-80 (D.D.C. 2004) (same); *see also Estates of Ungar ex rel. Strachman v. Palestinian Auth.*, 304 F. Supp. 2d 232, 250-57 (D.R.I. 2004) (holding Hamas subject to personal jurisdiction).

Third, foreign organizations often can be made to pay meaningful damages to victims, whereas natural persons who commit torture or extrajudicial killings abroad are likely to be judgment-proof. Natural persons who commit torture and extrajudicial killing abroad typically lack significant resources. Nor do they tend to be subject to a U.S. court's enforcement power. In contrast, organizations that direct torture and extrajudicial killing often have assets that can provide victims with meaningful remedies. *See, e.g.*, *Knox v. Palestine Liberation Org.*, 628 F. Supp. 2d 507 (S.D.N.Y. 2009) (conducting a close review of the assets of the PA and the PLO and finding a multi-million dollar bond reasonable). What is more, U.S. courts can often attach those assets in order to satisfy judgments. *See, e.g.*, *Strachman v. Palestinian Auth.*, 901 N.Y.S.2d 582 (App. Div. 2010) (attaching multi-million dollar investment portfolio and holding a trial to determine whether it belonged to the PA).

The court of appeals ignored all of these considerations. Once they are taken into account, it is impossible to see how the TVPA can meaningfully

serve its remedial function by reaching only natural persons as defendants. Limiting the TVPA to natural persons would render it a dead letter in all but the most unusual circumstances.

2. The TVPA also is designed to hold "legally accountable" those who torture and kill in disregard for basic human rights. S. Rep. No. 102-249, at 3. Militant and terrorist groups often take "credit" for torturing and killing their victims. For example, al-Shabaab has taken credit for atrocities in Somalia, *see* U.S. Dep't of State, 2010 HUMAN RIGHTS REPORT: SOMALIA (2011), and the Taliban has taken credit for torturing those who oppose its power in Afghanistan, *see* U.S. Dep't of State, 2008 HUMAN RIGHTS REPORT: AFGHANISTAN (2009). Accordingly, the U.N. special rapporteur appointed to monitor the status of all U.N. treaties pertaining to extrajudicial killing reports not only on natural persons who commit such acts, but also (indeed, primarily) on groups that programmatically commit such atrocities. His reports monitor organizations such as the Davao Death Squad in the Philippines and "paramilitary groups" like the Tamil Tigers in Sri Lanka. *See* U.N. SPECIAL RAPPORTEUR ON EXTRAJUDICIAL EXECUTIONS HANDBOOK, ch. 3, at 38, 108 (2010).

It is hard to believe that groups that use their status as organizations to take ownership over such heinous acts should simultaneously be able to rely on that status to evade accountability in U.S. courts. Such a scenario would make a mockery of the TVPA.

3. Finally, the TVPA seeks "to deter" torture and extrajudicial killing. *Baloco ex rel. Tapia v. Drummond Co.*, 640 F.3d 1338, 1347 (11th Cir. 2011). This aim would likewise be stymied if organizations

were immunized from liability. Most acts of torture and extrajudicial killing are committed by organized groups rather than by natural persons acting alone. *See, e.g.*, U.S. Dep't of State, 2008 HUMAN RIGHTS REPORT: ZIMBABWE (2009) (the ruling political party, ZANU-PF, "set up numerous torture camps throughout the country"); U.S. Dep't of State, 2001 HUMAN RIGHTS REPORT: AFGHANISTAN (2002) ("[T]he Taliban summarily executed approximately 300 Hazara men and boys.").

To prevent these acts of torture and extrajudicial killing, such organizations need to face liability in a way that strikes directly at their organizational resources. Otherwise, organizations with patterns or programs of torturing or killing Americans could simply replace one torturer or killer with another, and then another, and another – each working as a cog in a machine that can act with impunity. *Cf. Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 150 (2d Cir. 2010) (Leval, J., concurring in the judgment). Surely Congress did not intend the TVPA to be so inept a deterrent.

III. The Legislative History Of The TVPA Reinforces That Congress Intended It To Reach Organizations.

There is no need to speculate about why Congress used the word "individual" to describe proper defendants under the TVPA. The Senate and House Reports both explicitly state that Congress did so to avoid including foreign states in the statute's sweep. At the same time, those reports and a constellation of other statements in the hearings and debates leading up to the TVPA's enactment

demonstrate that Congress understood the Act to apply to non-sovereign entities such as the PLO.

A. Congress Used The Word "Individual" In The TVPA To Exclude *States*, Not Non-Sovereign Organizations.

The Senate Judiciary Committee Report on this legislation contains a section that addresses the very issue in this case. The section is entitled "Who can be sued." S. Rep. No. 102-249, at 7 (1991). In that section, the Judiciary Committee explains:

> The legislation uses the term "individual" to make crystal clear that foreign states or their entities cannot be sued under this bill under any circumstances: only individuals may be sued. Consequently, the TVPA is not meant to override the Foreign Sovereign Immunities Act (FSIA) of 1976, which renders foreign sovereigns immune from suits in U.S. courts, except in certain instances.

Id. (footnote omitted). The House Report makes the same point, explaining that "[o]nly 'individuals,' *not foreign states*, can be sued under the bill." H.R. Rep. No. 102-367, at 4 (1991) (emphasis added). Congress thus used the word "individual" not to categorically abandon – for what would apparently have been the first time ever – the presumption that organizations are liable for the torts of their agents, but rather to avoid impinging on sovereign immunity.

Neither the court of appeals nor respondents acknowledge these explicit and direct explanations of why Congress worded the TVPA the way it did. Indeed, the court of appeals did not discuss the TVPA's legislative history at all. For their part,

respondents assert – quoting a single legislator's statement in a House committee meeting four years before the TVPA's enactment – that the Act used the word "individual" instead of "person" "to make clear that the bill applies 'to individuals and not to corporations.'" BIO 20 n.3 (quoting *The Torture Victim Protection Act: Hearing and Markup on H.R. 1417 Before the Subcomm. on Human Rights & Int'l Orgs. of the H. Comm. on Foreign Affairs*, 100th Cong. [hereinafter "1988 House TVPA Hearing"] 87-88 (1988)).

The snippet that respondents cite is of no moment. This Court has "repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which represen[t] the considered and collective understanding of those [Members of Congress] involved in drafting and studying proposed legislation." *Eldred v. Ashcroft*, 537 U.S. 186, 209 n.16 (2003) (alterations in original) (quoting *Garcia v. United States*, 469 U.S. 70, 76 (1984)) (quotation marks omitted). And here those reports, issued shortly before the TVPA's enactment, specifically explain that the word "individual" is meant to exclude *states*. There is no language in either of the committee reports suggesting that the word "individual" is meant to immunize non-sovereign, organizational entities from liability.

But even if one were to look to statements in hearings for evidence of legislative intent on this point, that would not help respondents. Everyone from Senator Arlen Specter, who sponsored the bill in

the Senate,[10] to a representative of the State Department,[11] to a human rights organization that supported the bill,[12] confirmed a collective understanding that the word "individual" was meant to avoid rendering foreign states liable. None of these individuals said anything about exempting non-sovereign organizations from liability.

That leaves the lone, unadorned comment respondents cite. Viewed from one perspective, the comment is fully consistent with using the word "individual" to steer clear of the FSIA. The FSIA immunizes corporations owned by foreign states, 28

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[10] In a 1992 hearing immediately preceding the vote on the TVPA, Senator Specter stated that the TVPA "does not override the FSIA and allow a suit against the foreign state. It only allows a suit against the individual(s) responsible for the torture, either by performing it or ordering it." 138 Cong. Rec. 4176, 4177 (Mar. 3, 1992).

[11] In a 1990 hearing, a legal advisor at the Department of State said that the TVPA "does not get to the government. . . . The statute itself only goes to individuals." *Torture Victim Protection Act of 1989: Hearing on S. 1629 and H.R. 1662 Before the Subcomm. on Immigration & Refugee Affairs of the S. Comm. on the Judiciary*, 101st Cong. [hereinafter "1990 Senate TVPA Hearing"] 30 (1990) (testimony of David P. Stewart, Assistant Legal Advisor, U.S. Dep't of State).

[12] In both congressional hearings on the bill, the Executive Director of the Lawyers Committee for Human Rights stated that under the TVPA, the "defendants would be the individual violators themselves and not the foreign governments." 1990 Senate TVPA Hearing at 48 (prepared statement of Michael H. Posner, Exec. Dir., Lawyers Comm. for Human Rights); *see also* 1988 House TVPA Hearing at 25 (same statement in prepared statement of Michael Posner, Exec. Dir., Lawyers Comm. on Human Rights).

U.S.C. § 1603(b), and, at the time the TVPA was drafted, courts construed this provision broadly to include even corporations that were not directly state-owned. *See, e.g., O'Connell Mach. Co. v. M.V. "Americana"*, 734 F.2d 115, 116-17 (2d Cir. 1984), *abrogated by Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003). But even if the legislator had something other than state-owned corporations in mind, his comment cannot be taken as genuine evidence of any intent to exclude non-sovereign entities from liability under the Act – especially not non-corporate organizations that might be formed for the very purpose of engaging in the atrocities Congress was targeting. The indicia of contrary intent on that subject in the committee reports and other statements are simply too overwhelming and too clear.

B. The Legislative History Expressly Assumes That Organizations Would Be Proper Defendants In A TVPA Lawsuit.

Lest there be any doubt that Congress envisioned organizations as proper defendants, the legislative history of the TVPA repeatedly demonstrates that the legislators assumed non-sovereign organizations would be subject to the TVPA.

1. The committee reports and hearings emphasize that the TVPA was intended to facilitate suits similar to *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984). *Tel-Oren* was a case in which the main defendant was one of the very defendants here: the PLO.

Tel-Oren arose from a "barbaric rampage" in which thirteen PLO operatives hijacked a civilian

bus, taking a number of passengers hostage. *Tel-Oren*, 726 F.2d at 776 (Edwards, J., concurring). While the members of the PLO were in control of the bus, they tortured and killed hostages, shot occupants of passing vehicles, and ultimately blew the bus up with grenades. *Id.* at 799 (Bork, J., concurring). In total, the PLO killed thirty-four people and wounded eighty-seven more. *Id.*

Many of those wounded in the attack, along with the survivors of many victims who were killed, filed suit against the PLO and several other organizations under the Alien Tort Statute. The D.C. Circuit, however, refused to allow the suit to go forward, with each judge providing his own rationale for requiring the case to be dismissed. *Id.* at 775 (per curiam). In the most controversial of these opinions, Judge Bork reasoned that, absent a clearer statement from Congress, the ATS could not support a cause of action for torture and extrajudicial killing. *Id.* at 799.

The House Report on the TVPA discusses the *Tel-Oren* case and notes that it "involv[ed] terrorist activities of the Palestine Liberation Organization." H.R. Rep. No. 102-367, at 4. That report and the Senate Report both state that the TVPA "would provide [the explicit] grant" of a private right of action that Judge Bork had said was lacking in *Tel-Oren*. *Id.*; *accord* S. Rep. No. 102-249, at 4-5 (identical language). The fact that both reports so explicitly describe the TVPA as responding to *Tel-Oren* and endorse the type of claims at issue in that case, without ever suggesting any problem with the organizational nature of the PLO as the primary defendant there, demonstrates that Congress understood the Act to apply to organizations such as

the PLO. Statements by Senator Specter and others confirm that this is so.[13]

2. Statements in the legislative history discussing other aspects of the TVPA further confirm Congress's assumption that the TVPA would apply to non-sovereign organizations. Among those statements:

• In its discussion of the TVPA's color of law requirement, the House Report states that the bill "does not attempt to deal with torture or killing by *purely private groups.*" H.R. Rep. No. 102-367, at 5 (emphasis added). This implies that groups acting under actual or apparent authority of foreign law would be subject to liability under the TVPA.

• The Senate Report clarifies that the bill was not intended to cover "*private*" acts committed by "*nongovernmental organizations.*" S. Rep. No. 102-249, at 8 (emphasis added). This statement evinces

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[13] In the Senate's hearing on the bill, Senator Specter noted that the defendants in *Tel-Oren* included the "Palestine Liberation Organization, the Palestine Information Office, the National Association of Arab-Americans, and the Palestine Congress of North America" and suggested that the TVPA would "establish some form of justice in the form of monetary damages" against such defendants. 1990 Senate TVPA Hearing at 64-65. Several other witnesses' statements at this hearing also implied that the TVPA would have allowed the *Tel-Oren* suit to proceed. *See id.* at 66 (testimony of Father Robert F. Drinan) (reporting on a letter from counsel in *Tel-Oren*, which stated that if the TVPA "had been the law, the result in *Tel-Oren* would have been different"); *id.* at 50 (prepared statement of Michael H. Posner, Exec. Dir., Lawyers Comm. for Human Rights) (stating that the TVPA would provide a clear cause of action for the kinds of acts at issue in *Tel-Oren*).

Congress's belief that a nongovernmental organization acting under color of law could be sued under the TVPA.

• The Senate Report refers to the activities of "death squads" as within the aims of the statute. S. Rep. No. 102-249, at 3; *see also* 1988 House TVPA Hearing at 40 (prepared statement of the Comm. on Int'l Human Rights of the N.Y.C. Bar Ass'n) ("The statute would apply . . . to situations where a government has attempted to conceal its responsibility by allowing nominally private persons, such as Central American 'death squads,' to carry out torture or killings."). "Death squads" at the time were not amorphous collections of people; they were well-funded, structured organizations that were treated as such. In El Salvador, for example, death squads frequently "operated in coordination with the armed forces and acted as a support structure for their activities." U.N. Comm. on Truth for El Salvador, From Madness to Hope: The 12-Year War in El Salvador 126, U.N. Doc. S/25500 (Apr. 1, 1993).

• With regard to the statute's jurisdictional requirement, the State Department explained that a "prospective defendant must be found in the United States or otherwise submit himself *(or itself)* to U.S. jurisdiction." *Torture Victim Protection Act of 1989: Hearing on S. 1629 and H.R. 1662 Before the Subcomm. on Immigration & Refugee Affairs of the S. Comm. on the Judiciary*, 101st Cong. 29 (1990) (prepared statement of David P. Stewart, Assistant Legal Advisor, U.S. Dep't of State) (emphasis added). Since the statute does not cover foreign governments, the parenthetical using the word "itself" can refer only to an organizational defendant.

C. Congress Intended For The TVPA To Enhance And Expand The Alien Tort Statute.

The House and Senate Reports also explain that the TVPA was intended to affirm and expand causes of action for torture and extrajudicial killing that courts had previously held were available to aliens under the jurisdictional grant of the ATS. *See, e.g.*, *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). Specifically, the reports state that the TVPA would "*enhance* the remedy already available" under the ATS and "extend a civil remedy also to U.S. citizens" who have been tortured abroad. S. Rep. No. 102-249, at 5 (emphasis added); H.R. Rep. No. 102-367, at 4 (same). An earlier House report makes the same point, stating that the TVPA "represents an effort to clarify *and expand* existing law pertaining to the practice of torture" and "authorizes suits by both aliens and U.S. citizens who have been victims of gross human rights abuses." H.R. Rep. No. 100-693, at 2 (1988) (emphasis added).

Accordingly, if the ATS subjects organizations to liability for torture or extrajudicial killing, then organizations must also be subject to liability under the TVPA. Any other outcome would flout Congress's intent to expand available remedies and would convert the benefit of U.S. citizenship into a handicap. Aliens, that is, would be able to sue organizations in U.S. courts for torture in foreign nations, but American citizens would not. It is implausible that Congress intended to create such a state of affairs.

* * *

Congress enacted the TVPA to guarantee a meaningful remedy in the U.S. Code for the most atrocious of human rights violations. This Court should construe the Act to fulfill that objective, not to limit liability in a manner unprecedented in federal tort law.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX

The Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992), *as codified (without preamble) at* 28 U.S.C. § 1350 note, *provides:*

An Act

To carry out obligations of the United States under the United Nations Charter and other international agreements pertaining to the protection of human rights by establishing a civil action for recovery of damages from an individual who engages in torture or extrajudicial killing.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Torture Victim Protection Act of 1991".

SEC. 2. ESTABLISHMENT OF CIVIL ACTION.

(a) LIABILITY. – An individual who, under actual or apparent authority, or color of law, of any foreign nation –

(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or

(2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

(b) EXHAUSTION OF REMEDIES. – A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.

(c) STATUTE OF LIMITATIONS. – No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose.

SEC. 3. DEFINITIONS.

(a) EXTRAJUDICIAL KILLING. – For the purposes of this Act, the term "extrajudicial killing" means a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.

(b) TORTURE. – For the purposes of this Act –

(1) the term "torture" means any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind; and

(2) mental pain or suffering refers to prolonged mental harm caused by or resulting from –

(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

(B) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

(C) the threat of imminent death; or

(D) the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

Approved March 12, 1992.

RESPONDENT'S BRIEF

No. 11-88

IN THE

Supreme Court of the United States

ASID MOHAMAD, INDIVIDUALLY AND FOR THE ESTATE OF AZZAM RAHIM, DECEASED, *ET AL.*,
Petitioners,

v.

PALESTINIAN AUTHORITY, *ET AL.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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QUESTION PRESENTED

Whether the Torture Victim Protection Act of 1991, 28 U.S.C. §1350 note, which authorizes actions against an "individual" who commits acts of torture or extrajudicial killing, permits actions against defendants that are not natural persons.

PARTIES TO THE PROCEEDINGS BELOW

Petitioners, who were plaintiffs-appellants below, are Asid Mohamad, individually and for the Estate of Azzam Rahim, Shahid Mohamad, Said Mohamad, Shahed Azzam Rahim, Mashhud Rahim, Mohamad Rahim, and Asia Rahim.

Respondents, who were defendants-appellees below, are the Palestinian Authority (also known as the Palestinian Interim Self-Government Authority) and the Palestine Liberation Organization. Jibril Rajoub, Amin Al-Hindi, and Tawfik Tirawi were named as defendants but were voluntarily dismissed and were not parties in the court of appeals.

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IN THE

Supreme Court of the United States

NO. 11-88

ASID MOHAMAD, INDIVIDUALLY AND FOR THE ESTATE OF AZZAM RAHIM, DECEASED, *ET AL.*,

Petitioners,

v.

PALESTINIAN AUTHORITY, *ET AL.*,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF FOR RESPONDENTS

PRELIMINARY STATEMENT

The Torture Victim Protection Act of 1991 ("TVPA" or the "Act") provides that "[a]n individual who * * * subjects an individual" to torture or extrajudicial killing under color of foreign law shall be liable "to that individual" or "to that individual's legal representative, or to any person who may be a claimant in an action for wrongful death." 28 U.S.C. § 1350 note § 2(a). The question in this case is whether the term "individual" in that statute means what it almost invariably means in ordinary and

legal usage—a natural person or human being. That question all but answers itself. While "person" often encompasses corporations and similar entities, "individual" does not. Indeed, Congress replaced the word "person" in an earlier draft of the statute with "individual" precisely to exclude organizations from liability.

The TVPA brings certain international human rights violations within the civil jurisdiction of U.S. courts. Mindful that it was creating a private cause of action with extraordinary extraterritorial reach, Congress proceeded carefully, tailoring the statute to achieve a limited but important purpose. By imposing liability on the responsible "individual," the Act prevents human rights violators from seeking safe haven in the United States. But by precluding suit against organizations alleged to be responsible for the individual's conduct (often the state itself), Congress limited the risk of international discord and potential interference with the Executive's conduct of foreign policy. Giving "individual" its ordinary meaning respects the careful balance Congress struck. The judgment of the court of appeals should accordingly be affirmed.

STATEMENT

I. STATUTORY FRAMEWORK

The Torture Victim Protection Act seeks to "protect[ ] * * * human rights by establishing a civil action for recovery of damages from an individual who engages in torture or extrajudicial killing." Pub. L. No. 102-256, pmbl., 106 Stat. 73, 73 (1992). It provides:

> An individual who, under actual or apparent authority, or color of law, of any foreign nation—
>
> (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or

> (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

28 U.S.C. § 1350 note § 2(a).

The TVPA was enacted to establish an express cause of action for certain claims previously brought under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350. The ATS was enacted in 1789 but lay largely dormant until 1980, when the Second Circuit decided *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). *Filartiga* held that the ATS provided jurisdiction over a claim arising out of a Paraguayan police inspector-general's torture and killing of a Paraguayan citizen. *Id.* at 878. "[A]n act of torture committed by a state official against one held in detention," the court ruled, "violates established norms of the international law of human rights, and hence the law of nations." *Id.* at 880.

Congress enacted the TVPA in 1992 to "establish an unambiguous and modern basis" for claims of official torture and extrajudicial killing of the sort brought in *Filartiga*. H.R. Rep. No. 102-367, at 3 (1991). The State and Justice Departments had expressed concerns about allowing suits for "acts of foreign governments or officials which take place in their own countries." *Torture Victim Protection Act of 1989: Hearing Before the Subcomm. on Immigration and Refugee Affairs of the S. Comm. on the Judiciary*, 101st Cong. 11-16, 22-29 (1990) ("*1990 Hearings*"). But Congress concluded that legislation was appropriate to "deny torturers a safe haven in this country." 138 Cong. Rec. 4176 (1992) (Sen. Specter).

Congress sought to "[s]trik[e] a balance between the desirability of providing redress for a victim and the fear

of imposing additional burdens on U.S. courts." H.R. Rep. No. 102-367, at 4. Accordingly, the Act carefully delineates the cause of action it creates. It specifically defines torture and extrajudicial killing. 28 U.S.C. §1350 note §3. It imposes a state-action requirement, providing redress only for torture or extrajudicial killing "under actual or apparent authority, or color of law, of any foreign nation." *Id.* §2(a). It contains an exhaustion requirement. *Id.* §2(b). And it prescribes a statute of limitations. *Id.* §2(c). Most importantly here, the Act provides a cause of action only against "individual[s]." *Id.* §2(a).

II. Background And Proceedings Below

A. Factual Background

This case arises from petitioners' claim that Azzam Rahim was detained, tortured, and killed by "the security forces of the Palestinian Authority" in late 1995, C.A. App. A25-A31, ¶¶18-32, 65, 70, around the time the Palestinian Authority assumed responsibility for certain territories pursuant to internationally brokered peace agreements.

1. The Palestinian Authority had its genesis in the 1993 Oslo Accords, in which Israel and the Palestine Liberation Organization ("PLO") agreed that it was "time to put an end to decades of confrontation and conflict, recognize their mutual legitimate and political rights, and strive to live in peaceful coexistence and mutual dignity and security and achieve a just, lasting and comprehensive peace settlement." Declaration of Principles on Interim Self-Government Arrangements, Isr.-PLO, pmbl., Sept. 13, 1993, 32 I.L.M. 1525, 1527. In the Oslo Accords, the parties agreed "to establish a Palestinian Interim Self-Government Authority * * * for the Palestinian people in the West Bank and the Gaza Strip, for a transitional period" until a permanent resolution could be

reached. *Id.* art. I, 32 I.L.M. at 1527. The framework established by the Accords was to be implemented through later agreements negotiated by the parties. *See id.* art. V, 32 I.L.M. at 1528-1529.

Under the first of those agreements, signed in 1994, the Israeli Civil Administration transferred most of its authority over civil affairs in the Jericho Area of the West Bank and the Gaza Strip to the Palestinian Authority. *See* Agreement on the Gaza Strip and the Jericho Area, Isr.-PLO, art. III, May 4, 1994, 33 I.L.M. 622, 628. Israel remained responsible for the security of Israelis and Israeli settlements, but responsibility for public order and the internal security of Palestinians in those areas was transferred to the Palestinian Directorate of Police Force, operating under the auspices of the Palestinian Authority. *See id.* arts. VIII, IX, 33 I.L.M. at 631-632.

The second implementation agreement, the 1995 Interim Agreement, further delineated the division of civilian and security responsibilities and set forth the basic structure and scope of the Palestinian Authority's executive, legislative, and judicial functions. *See* Interim Agreement on the West Bank and the Gaza Strip, Isr.-PLO, Sept. 28, 1995, 36 I.L.M. 551. That agreement also provided for the dissolution of the Israeli Civil Administration and the withdrawal of Israeli military forces from additional areas of the West Bank not covered by the earlier agreement, as well as for a scheduled transfer of certain powers and responsibilities to the Palestinian Authority. *See id.* art. I, 36 I.L.M. at 558-559.

Although a permanent resolution has not been achieved in the 20 years since the Oslo Accords, the Palestinian Authority continues to fulfill a critical role in promoting economic development and security for West Bank residents. Continuing the policies of his predeces-

sor, President Obama has commended Palestinian Authority President Mahmoud Abbas and Prime Minister Salam Fayyad for their ambitious campaign of reform, economic development, and institution-building, observing that their "hard work and dedication" in the face of nearly insurmountable obstacles is "strengthening the security as well as improving the economic situation for [their] people." *Remarks Following a Meeting with President Mahmoud Abbas of the Palestinian Authority*, 2010 Daily Comp. Pres. Doc. 472 (June 9, 2010). International organizations have echoed those views.[1] Moreover, Palestinian Authority security forces—trained by the United States and other Western powers—play a pivotal role in preventing violence and terrorism in the region.[2]

2. Because this case arises on a motion to dismiss, the complaint's well-pleaded factual allegations are taken as true. According to the complaint, Azzam Rahim was kidnapped, tortured, and killed by "the security forces of the Palestinian Authority." C.A. App. A30-A31, ¶¶65, 70. Specifically, the complaint alleges that on September 27, 1995, Rahim was abducted from a West Bank village by "plain clothes men who identified themselves as security police" and took him "to a prison in Jericho" where he

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[1] *See, e.g.*, World Bank, *Sustaining Achievements in Palestinian Institution-Building and Economic Growth* 13-31 (2011); Int'l Monetary Fund, *Macroeconomic and Fiscal Framework for the West Bank and Gaza: Seventh Review of Progress* 29-32 (2011).

[2] Palestinian Authority security forces have now been "deployed in all major cities of the West Bank, and violence in these areas has decreased markedly since a series of PA security campaigns that started in 2007." U.S. Dep't of State, *Israel, the West Bank and Gaza: Country Specific Information*, http://travel.state.gov/travel/cis_pa_tw/cis/cis_1064.html; *see also* World Bank, *supra*, at 13 ("The PA has made major progress in bringing safety and security to the West Bank * * * .").

was "tortured." *Id.* at A24-A25, ¶24. Two days later, an ambulance delivered Rahim's body to the village. *Id.* at A26, ¶32.

The complaint named the Palestinian Authority and PLO as defendants, as well as Jabril Rajoub, identified as "head of the Palestinian Preventive Security Force in the West Bank," and two other individuals identified as senior Palestinian security officials. C.A. App. A23, ¶¶10-14. Other than the claim that "[l]ocal villagers * * * recognized the security police officers who seized Azzam Rahim * * * as agents of defendant Jibril Rajoub," *id.* at A24, ¶25, the complaint alleges no facts indicating that any of the individual defendants had any involvement in Rahim's alleged torture or death.[3]

More importantly, the complaint provides only the most conclusory allegations of respondents' culpability. It alleges that Rahim was tortured and killed by "the security forces of the Palestinian Authority," C.A. App. A30-A31, ¶¶61, 65, 70, but it nowhere suggests that the Palestinian Authority had any role in, or knowledge of, the alleged misconduct. Instead, liability is premised on the assertion that the acts were "carried out pursuant to a general policy of the Palestinian Authority and the PLO's leadership that is designed to terrorize the Palestinian population and to ensure that an elite Palestinian leadership circle is able to maintain power at all costs." *Id.* at A29, ¶57; *see also id.* at A28, ¶¶52-53 (alleging other "human rights abuses by the Palestinian Authority").

The U.S. State Department's *Human Rights Report for Israel and the Occupied Territories* (1995), C.A. App. A82-A100, provides a different perspective. That report

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[3] Ultimately, petitioners voluntarily dismissed their claims against the individual defendants; only the Palestinian Authority and the PLO remain as defendants. C.A. App. A148-A149.

identifies Rahim as one of "[f]ive Palestinians * * * who died in the custody of PA security officers" that year. *Id.* at A85.[4] But the report recounts that "one of the deaths was accidental and another due to pre-existing medical conditions." *Id.* It also explains that "[s]everal Palestinian officials have been sentenced for their role in some of these cases," and that "[t]hree intelligence officers were sentenced for their role" in Rahim's case. *Id.* at A85-A86.

Although the complaint also names the PLO as a defendant, that organization's alleged role is unclear. The PLO is an umbrella organization for various political parties and factions that are dedicated to establishing a Palestinian state. *See* Permanent Observer Mission of Palestine to the United Nations, *PLO: Introduction*, http://www.un.int/wcm/content/site/palestine/pid/12003. The Oslo agreements do not confer any authority on the PLO for the operation of security forces or prisons in the West Bank. *See* pp. 4-5, *supra*. Moreover, the complaint alleges that Rahim was detained by "security forces of the *Palestinian Authority*" and "died while being held in the custody of the *Palestinian Authority*." C.A. App. A28, A30, ¶¶52, 61 (emphasis added). Although the complaint asserts that the misconduct was carried out by defendants pursuant to a general PLO policy of "terroriz[ing] the Palestinian population," *id.* at A29, ¶57, and that the

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[4] While any death in custody is regrettable, that statistic is not out of line with those of many long-established governments operating in less challenging circumstances. *See, e.g.*, U.S. Dep't of State, *2010 Country Reports on Human Rights Practices: Brazil* 8 (2011) (reporting deaths of at least six prisoners caused by police in two days); U.S. Dep't of State, *2010 Country Reports on Human Rights Practices: Spain* 3 (2011) (noting that "11 persons died while in police custody" and "28 died in jail" in 2009); U.S. Dep't of State, *2010 Country Reports on Human Rights Practices: Italy* 4 (2011) (noting 160 deaths in custody, including 61 by suicide, over 11 months).

individual defendants were "high ranking official[s]" of both the Palestinian Authority and the PLO, *id.* at A23, ¶¶12-14, it is devoid of specific factual allegations that the PLO was involved in the events at issue.[5]

B. District Court Proceedings

Ten years after Rahim's death, petitioners (Rahim's widow and sons) brought this action in the U.S. District Court for the Southern District of New York seeking damages under the TVPA. C.A. App. A48.[6] The case sat dormant for nearly two years until June 2007, when the clerk entered a default. *Id.* at A12. Respondents then retained U.S. counsel, sought vacatur of the default, and moved to dismiss, asserting both lack of personal juris-

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[5] Notwithstanding the purely legal nature of the question before the Court, petitioners and *amici* reach back into an earlier period in the PLO's history in an attempt to disparage respondents. Those efforts are neither relevant nor well-founded. For example, petitioners and *amici* cite a 1987 congressional finding and the PLO's alleged role in a 1978 attack. *See* Pet. Br. 46-48; API Br. 5. But those events preceded the PLO's renunciation of violence in the Algiers Declaration in 1988, *see* PLO Palestine Nat'l Council, *Political Communique and Declaration of Independence*, 27 I.L.M. 1660, 1670 (1988), as well as its reaffirmation of that commitment to peace in the 1993 Oslo Accords. *Amici* also assert that courts have found that the PLO "engaged in brutal acts of terrorism and torture," API Br. 5; *see also* Pet. Br. 13-14, but the cited case affirmed entry of a *default* judgment based on a shooting by Hamas, not the PLO. *Ungar v. Palestine Liberation Org.*, 402 F.3d 274, 276 (1st Cir. 2005). That default judgment was later vacated. *See* Dkt. No. 657 in *Estate of Yaron Ungar v. Palestinian Auth.*, No. 1:00-cv-105L (D.R.I. Feb. 14, 2011).

[6] The complaint also asserted claims under the ATS and federal common law. C.A. App. A56-A58, ¶¶73-96. But petitioners eventually conceded that they could not proceed under the ATS, Pet. App. 16a n.1, and the district court and court of appeals rejected their common law claims, *id.* at 11a-13a, 19a-21a. Petitioners do not seek review of those rulings here.

diction and failure to state a claim. *See id.* at A9-A10; Pet. App. 4a.

At petitioners' request, the case was transferred to the U.S. District Court for the District of Columbia. C.A. App. A18. That court vacated the default and granted the motion to dismiss, ruling that the TVPA, by providing a cause of action only against "individual[s]," restricted liability to natural persons. Pet. App. 14a-21a. "A plain reading of the statute and the applicable case law," the court explained, "leads this Court to overwhelmingly conclude that the term 'individual' includes only human beings." *Id.* at 17a. "Simply stated, Congress's plain intent as reflected in the text (which specifies only individuals) and the legislative history (which could not be clearer) was to confine liability for acts of torture and extrajudicial killing to private individuals." *Id.* at 18a (quotation marks omitted).[7]

C. The Court of Appeals' Decision

The court of appeals (Ginsburg, Tatel & Garland, JJ.) affirmed. Pet. App. 1a-13a. Like the district court, the court of appeals began with the TVPA's plain text. *Id.* at 6a-8a. Because the TVPA does not define "individual," the court explained, that term must be "give[n] its ordinary meaning, * * * which typically encompasses only natural persons and not corporations or other organizations." *Id.* at 7a. Canvassing decisions of this Court and other federal courts, the court of appeals observed that

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[7] The district court did not address respondents' challenge to personal jurisdiction. C.A. App. A79. Petitioners are thus mistaken in asserting that the court exercised personal jurisdiction over respondents. Pet. Br. 6. Nor did the court address respondents' argument that the TVPA's requirement that the alleged acts be committed under authority or color of law of a "foreign nation" was not met. C.A. App. A78.

courts had repeatedly concluded that "individual" refers only to natural persons. *Id.* at 7a-8a.

The court of appeals rejected petitioners' argument that "the term 'individual' is at least ambiguous" as well as their claim that the term should be given the same meaning as "person" in other statutes. Pet. App. 8a. The "structure of the TVPA," the court held, "confirms what the plain text of the statute shows: The Congress used the word 'individual' to denote only natural persons." *Id.* The TVPA "uses the word 'individual' five times in the same sentence—four times to refer to the victim of torture or extrajudicial killing, which could be only a natural person, and once to the perpetrator of the torture or killing." *Id.* at 8a-9a (citing 28 U.S.C. §1350 note §2(a)). "The Rahims advance no cogent reason, and we see none, to think the term 'individual' has a different meaning when referring to the victim as opposed to the perpetrator." *Id.* at 9a.

The court of appeals also observed that the TVPA uses the word "person" rather than "individual" to identify potential claimants: A suit can be filed by the victim, his legal representative, or any "'*person* * * * who may be a claimant in an action for wrongful death.'" Pet. App. 9a (quoting 28 U.S.C. §1350 note §2(a)) (emphasis added). Congress's decision to use the expansive term "person" elsewhere in the statute "further support[ed] the significance of the Congress having used 'individual' rather than 'person' to identify who may be sued under the TVPA." *Id.*

The court of appeals then turned to petitioners' argument, raised "for the first time" in their reply brief, that "the defendants are secondarily liable for Rahim's death either pursuant to the principle of respondeat superior or for aiding and abetting his killer(s)." Pet. App. 10a. The

court ruled that argument was waived but also observed that it was unpersuasive. *Id.* "[E]ven if we assume some form of vicarious liability is possible, the text of the TVPA still limits such liability to individuals, and we have already seen that in this statute 'individual' comprises only natural persons." *Id.* (quotation marks and citation omitted).[8]

SUMMARY OF ARGUMENT

I.A. The TVPA imposes liability only on an "individual" who commits torture or extrajudicial killing under color of foreign law. 28 U.S.C. §1350 note §2(a). Dictionaries, common usage, case law, and statutes all make clear that the ordinary meaning of "individual" is a natural person or human being. While the broader term "person" has a specialized legal meaning that encompasses corporations and other entities, "individual" does not.

Petitioners offer no accepted alternative definition. They urge that "individual," when used to "plac[e] * * * emphas[i]s on the *oneness* of something," "comfortably encompass[es]" organizations. Pet. Br. 18. But that definition would also encompass foreign states and state entities, which petitioners admit Congress intended to exclude. Every court of appeals that has meaningfully addressed the issue has agreed that the TVPA applies only to natural persons.

B. The TVPA's remaining text confirms Congress's intent. The Act's liability provision uses the term "individual" five times to refer to the defendant or the victim. And a victim of torture or extrajudicial killing can only be a natural person. By contrast, the Act uses the broader

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[8] Having held that respondents were not "individuals" within the meaning of the TVPA, the court of appeals did not reach respondents' alternative argument that the TVPA's state-action requirement was not met. *See* C.A. Br. 40-44.

term "person" or "claimant" to refer to potential plaintiffs, which may include organizations. Congress's careful word choice makes clear that Congress used "individual" to refer only to natural persons.

C. Congress did not merely use the term "individual" rather than "person." It *changed* the term "person" to "individual" for the express purpose of excluding organizational liability. And while petitioners urge that Congress sought to exclude *state* liability, the way Congress accomplished that result was by limiting the Act to natural persons.

D. Finally, the Act's broad extraterritorial sweep counsels for a narrow construction. As the State and Justice Departments both warned, an extraterritorial tort statute has grave potential to disrupt foreign relations. Limiting the Act to the natural persons who actually commit or direct the torture or extrajudicial killing reduces the risk of friction with foreign governments.

II.A. Petitioners' attempts to avoid the Act's plain meaning all fail. *Clinton v. City of New York*, 524 U.S. 417 (1998), refutes rather than supports their position. That case construed "individual" to include organizations only to avoid an "absurd result"—a result the term's ordinary meaning would otherwise have "dictate[d]." *Id.* at 429 n.14. Here, by contrast, Congress had legitimate reasons to limit the Act to natural persons.

B. Nor is petitioners' construction necessary to avoid undermining the Act's purpose. No legislation pursues its purposes at all costs. And Congress passed the TVPA to prevent the United States from becoming a safe haven for torturers, not to encourage long-arm jurisdiction over multinational corporations. Finally, petitioners' reliance on the Convention Against Torture ignores that treaty's clear limitations.

C. Petitioners' reliance on *in pari materia* principles is similarly unavailing. The other statutes they cite all use different language precisely where it counts. Those differences underscore the importance of giving effect to Congress's word choice here. And while petitioners advert to background principles of vicarious liability, those arguments are waived and meritless in any event.

D. Finally, the portions of the legislative history that petitioners cite undermine their position. That history shows that Congress enacted the TVPA to provide a modern grounding for the sort of claim brought against an individual torturer in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980)—not to target entities like the PLO. The legislative history confirms that Congress meant what it said when it limited the Act's coverage to "individuals."

ARGUMENT

I. THE PLAIN MEANING OF THE TVPA'S TEXT LIMITS LIABILITY TO NATURAL PERSONS

The Torture Victim Protection Act provides that "[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation" "subjects an individual" to torture or extrajudicial killing shall "be liable for damages to that individual" or "to that individual's legal representative, or to any person who may be a claimant in an action for wrongful death." 28 U.S.C. §1350 note §2(a). The ordinary meaning of "individual" is a natural person, as contrasted with a group or organization. Congress's intent to use "individual" in that ordinary sense is apparent from its repeated use of that term in the same provision to refer to natural persons (the victims of torture and extrajudicial killing) and by its contrasting use of "person" to refer to a class that could encompass non-natural persons (claimants in a wrongful death action).

The history of the Act confirms that Congress adopted the term "individual" to make clear that organizations would not be subject to liability.

A. The Ordinary Meaning of "Individual" Is a Natural Person or Human Being

This Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-254 (1992). This Court's analysis "begins with 'the language of the statute,'" and "where the statutory language provides a clear answer, it ends there as well." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999).

The TVPA imposes liability on an "individual." Where, as here, a statute uses a term that it does not define, the term must be given its ordinary meaning. *See FCC v. AT&T Inc.*, 131 S. Ct. 1177, 1182 (2011). As the court below unanimously recognized, the ordinary meaning of "individual" is a natural person, not a legal entity like a corporation. Pet. App. 6a-8a.

1. In ordinary usage, "individual" refers to "a single human being, as distinguished from a group." *Random House Dictionary of the English Language* 974 (2d ed. 1987); *see also Webster's Third New International Dictionary* 1152 (1986) ("a single human being as contrasted with a social group or institution"). Because "individual" does not have a different specialized legal meaning, legal dictionaries define the term in a manner consistent with its ordinary usage: "As a noun, [individual] denotes a single person as distinguished from a group or class, and also, very commonly, a private or natural person as distinguished from a partnership, corporation, or association." *Black's Law Dictionary* 773 (6th ed. 1990). "*[I]ndividual* is best confined to contexts in which the writer

intends to distinguish the single (noncorporate) person from the group or crowd." B. Garner, *A Dictionary of Modern Legal Usage* 291 (1987).

We thus use "individual" in both common and legal parlance to make clear that we are referring to a human being and not a group, corporation, or institution. We contrast an individual tax return with a corporate return, individual tax rates with corporate rates, and individual campaign contributions with corporate contributions. We contrast individual responsibility with corporate responsibility, individual defendants with corporate or governmental defendants, individual investors with institutional investors, and an individual mandate with one imposed on businesses. The Federal Rules of Civil Procedure provide rules for service of process on an "individual" that are separate from the rules for serving a "corporation, partnership or association" or a "foreign, state, or local government." Fed. R. Civ. P. 4(e), 4(h), 4(j).

This Court routinely uses "individual" to distinguish a human being from a corporation or other artificial entity. In *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846 (2011), the Court stated that, "[f]or an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home." *Id.* at 2853-2854. And in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), the Court explained that whether a case may proceed under the Alien Tort Statute depends on whether international law extends liability "to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual." *Id.* at 732 n.20.

Case after case has thus construed "individual" in federal statutes to mean a natural person and not an artifi-

cial entity like a corporation. *See, e.g., In re Spookyworld, Inc.*, 346 F.3d 1, 7-8 (1st Cir. 2003) (provision allowing claims by an "individual" does not apply to corporations); *In re Just Brakes Corp. Sys., Inc.*, 108 F.3d 881, 884-885 (8th Cir. 1997) ("plain meaning of the word 'individual'" does not apply "to corporate entities"); *In re Jove Eng'g, Inc.*, 92 F.3d 1539, 1549-1553 (11th Cir. 1996) ("[T]he term 'individual' is limited to natural persons and does not include corporations or other artificial entities."); *In re North*, 12 F.3d 252, 255 (D.C. Cir. 1994) ("Had Congress intended to allow corporations to seek and obtain fee awards, it could have employed language authorizing application by a 'subject' rather than 'an individual who is the subject.'"); *In re Goodman*, 991 F.2d 613, 618-620 (9th Cir. 1993) ("'[I]ndividual' means individual, and not a corporation or other artificial entity."); *In re Chateaugay Corp.*, 920 F.2d 183, 184-187 (2d Cir. 1990) ("[T]he plain meaning of 'individual' * * * would appear to prevent application of the section to [corporations]."); *Crawford & Co. v. Apfel*, 235 F.3d 1298, 1304-1305 (11th Cir. 2000) (upholding agency's "interpretation of the word 'individual' to mean only human beings and not businesses").

2. Precisely because its meaning is so obvious, "individual" is not frequently defined in the U.S. Code. When provisions do define the term, they routinely do so merely to confirm that the term includes only natural persons (or certain categories of natural persons). *See* 5 U.S.C. § 552a(a)(2) ("[T]he term 'individual' means a citizen of the United States or an alien lawfully admitted for permanent residence * * * ."); 20 U.S.C. § 5602(3) ("[T]he term 'eligible individual' means a citizen or national of the United States or a permanent resident alien of the United States * * * ."); 29 U.S.C. § 1301(a)(14)(C)(ii)(V) ("'[I]ndividual' means a living human being * * * ."); 43

U.S.C. §390bb(4) ("The term 'individual' means any natural person, including his or her spouse, and including other dependents thereof * * * ."). Those statutes include legislation passed by the same Congress that enacted the TVPA in 1992. *See* Pub. L. No. 102-229, §214, 105 Stat. 1701, 1719 (1991) (codified at 29 U.S.C. §1301(14)(C)(ii)(V)); *see also* 137 Cong. Rec. 2255 (1991) ("'The term "individual" means a human being.'").

The Code of Federal Regulations reflects the same consensus: "Individual means a natural person."[9] As one regulation explains, "[i]ndividual means a citizen of the United States or an alien lawfully admitted * * * but does not include proprietorships, businesses, or corporations." 10 C.F.R. §1008.2(f); *see also* 20 C.F.R. §401.25 ("Individual * * * means a living person who is a citizen of the United States or an alien lawfully admitted for permanent residence. It does not include persons such as sole proprietorships, partnerships, or corporations.").

Federal law is hardly unique. *Every one* of the 50 States has at least one statute defining "individual" as a "natural person."[10] And state statutes regularly distin-

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[9] *See, e.g.*, 7 C.F.R. §1.302(l); 10 C.F.R. §13.2; 12 C.F.R. §261a.2(c); 14 C.F.R. §1264.101(j); 15 C.F.R. §25.2; 16 C.F.R. §4.13(b)(1); 20 C.F.R. §355.2; 22 C.F.R. §35.2(j); 28 C.F.R. §71.2; 29 C.F.R. §22.2(j); 31 C.F.R. §16.2; 34 C.F.R. §33.2; 38 C.F.R. §42.2; 40 C.F.R. §27.2; 41 C.F.R. §105-70.002(h); 43 C.F.R. §35.2(i); 45 C.F.R. §79.2; 47 C.F.R. §1.1918(a); 49 C.F.R. §31.2.

[10] *See* Ala. Code §5-26-3(4); Alaska Stat. §15.13.400(11); Ariz. Rev. Stat. §43-104(12); Ark. Code §26-18-104(7); Cal. Civ. Code §1798.3(d); Colo. Rev. Stat. §7-90-102(31.5); Conn. Gen. Stat. §1-91(i); Del. Code tit. 5, §2403(5); D.C. Code §31-1131.02(4A); Fla. Stat. §608.402(13); Ga. Code §48-1-2(12); Haw. Rev. Stat. §414-3; Idaho Code §26-31-303(4); 410 Ill. Comp. Stat. 520/2(e); Ind. Code §23-17-2-15; Iowa Code §535D.3(5); Kan. Stat. §79-32,109(b); Ky. Rev. Stat. §271B.1-400(14); La. Rev. Stat. §22:1692(5); Me. Rev. Stat. tit. 13-C, §102(18); Md. Code, Ins. §9-401(g); Mass. Gen. Laws ch. 255F, §1; Mich.

guish "individuals" from corporations or other entities.[11]

3. By contrast, the term "person," which also refers to a natural person in ordinary usage, "often has a broader meaning in the law." *Clinton v. City of New York*, 524 U.S. 417, 428 n.13 (1998). The federal Dictionary Act defines "person" to include "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, *as well as individuals*." 1 U.S.C. §1 (emphasis added). And the same Congress that enacted the TVPA passed another statute prescribing penalties for "person[s] other than an individual," *i.e.*, "[c]orporations, partnerships, and associations." Pub. L. No. 102-282, §2, 106 Stat. 149, 150 (1992) (codified at 21 U.S.C. §335a(a)(1)). Those formulations make sense only if the ordinary meaning of "individual" does not encompass legal entities like corporations.

Comp. Laws §333.1105(1); Minn. Stat. §13.02; Miss. Code §79-29-105(l); Mo. Rev. Stat. §355.066(19); Mont. Code §30-14-1702(4); Neb. Rev. Stat. §21-1711; Nev. Rev. Stat. §679A.097; N.H. Rev. Stat. §397-A:1(VIII-b); N.J. Stat. §17:11C-2; N.M. Stat. §58-21-2(G); N.Y. Banking Law §599-b(5); N.C. Gen. Stat. §53-244.030(14); N.D. Cent. Code §13-10-02(4); Ohio Rev. Code §1322.01(S); Okla. Stat. tit. 24, §162(5); Or. Rev. Stat. §60.001(21); 1 Pa. Cons. Stat. §1991; R.I. Gen. Laws §7-1.2-106(9); S.C. Code §40-11-20(16); S.D. Codified Laws §10-43-1(8); Tenn. Code §45-13-105(8); Tex. Bus. Orgs. §1.002(38); Utah Code §20A-12-301(5); Vt. Stat. tit. 8, §2200(8); Va. Code §13.1-603; Wash. Rev. Code §19.215.010(3); W. Va. Code §46A-2A-101(5); Wis. Stat. §126.01(15); Wyo. Stat. §17-16-140(a)(xviii).

[11] *See, e.g.*, Colo. Rev. Stat. §10-2-103(3) ("'Individual' means any private or natural person as distinguished from a partnership, corporation, association, or any foreign or domestic entity * * * ."); Fla. Stat. §501.603(7); Haw. Rev. Stat. §171-14.5(a); Idaho Code §11-601(1); 415 Ill. Comp. Stat. 5/22.2(h)(2)(F); Iowa Code §422.4(9); N.M. Stat. §57-1-6(C); Wash. Rev. Code §30.22.040(9); W. Va. Code §33-12-2(c).

Notably, at the same time Congress enacted the TVPA, it was in the midst of revising part of the U.S. Code to "conform [it] to common contemporary usage" (without "substantive change"). S. Rep. No. 102-410, at 3-4 (1992). One of the "standard changes" Congress decided to make was to "substitute[ ]" the "word 'individual' * * * for 'person' when referring to a human being." *Id.*; *see also* H.R. Rep. No. 102-280, at 4 (1991). Congress enacted those changes soon after, replacing "person" with "individual" in provisions such as 49 U.S.C. §§1134(d), 20505, and 41741. *See* Pub. L. No. 103-272, 108 Stat. 745, 755, 884, 1152 (1994). The notion that Congress moved the opposite direction in the TVPA by using "individual" to refer to organizations is implausible.

4. Petitioners argue that "[w]ords that refer in common usage only to natural persons typically encompass organizational entities in the context of tort statutes." Pet. Br. 17. But they do not identify a single tort statute that uses "individual" to refer to organizations. Indeed, in the two examples petitioners cite, the statutory terms are "person" and "whoever." *See id.* The Dictionary Act defines both terms to encompass "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 1 U.S.C. §1.

Citing the TVPA's legislative history, petitioners acknowledge that Congress intended to exclude certain organizations—"'foreign states or their entities'"—from liability. Pet. Br. 20-21. According to petitioners, "individual," in contrast to "person," "more clearly excludes states, but still encompasses other non-natural entities." *Id.* at 20. Petitioners thus ask the Court to define "individual" to include natural persons and non-state organizational entities (who nonetheless must meet the TVPA's state action requirement) but not state entities.

But petitioners do not and cannot offer any accepted definition of "individual" that fits the definition they propose: They identify no definition that excludes states but does not likewise exclude other entities like corporations. Citing *Webster's*, petitioners propose definitions such as "a single or particular being or thing or group of beings or things," "a single object or thing * * * regarded as a unit," or "a group considered as a unit." Pet. Br. 18 (quotation marks omitted). Those definitions, they contend, "plac[e] * * * emphas[i]s on the *oneness* of something"—an emphasis that "comfortably encompass[es]" organizations like respondents. *Id.* But that "emphas[i]s on the *oneness* of something" just as comfortably encompasses "one nation" such as Norway or France, entities petitioners agree are excluded from the term "individual."

Petitioners' own definition would thus impose liability on the very organizations—foreign states and their entities—they claim the term "individual" was designed to exclude. By contrast, the ordinary meaning of "individual" excludes foreign governments while excluding other organizations as well. Petitioners' position thus reduces to either the claim that Congress deliberately chose the word "individual" to exclude foreign states but included them nonetheless, or the claim that "individual" has a meaning (natural persons plus artificial entities but not state entities) that departs from any accepted understanding of the term. Neither contention is plausible. "[C]onstruing statutory language is not merely an exercise in ascertaining 'the outer limits of [a word's] definitional possibilities.'" *AT&T*, 131 S. Ct. at 1184. Much less is it an exercise in going far beyond those outer limits, the course petitioners chart here.

5. Every court of appeals that has carefully evaluated the TVPA's text—the D.C., Fourth, and Ninth Cir-

cuits—has come to the same conclusion: "[T]he term 'individual' in the TVPA," consistent with its "ordinary meaning, * * * encompasses only natural persons and not corporations or other organizations." Pet. App. 7a; *see also Aziz v. Alcolac, Inc.*, 658 F.3d 388, 392-393 (4th Cir. 2011) (the "TVPA admits of no ambiguity" and "[t]he plain and ordinary meaning of 'individual' is 'a single human being'"); *Bowoto v. Chevron Corp.*, 621 F.3d 1116, 1126, 1127 (9th Cir. 2010) (because "the word 'individual' in a statute refers to natural persons and not corporations," it "is evident that Congress drafted the TVPA in such a manner as to limit liability to natural persons"). The overwhelming weight of authority in the district courts agrees.[12]

The only court of appeals that has reached the opposite result never analyzed the meaning of "individual" or offered any reason to construe it to encompass organizations. In *Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242 (11th Cir. 2005), the Eleventh Circuit allowed a suit against a corporation without addressing whether

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[12] *See Shafi v. Palestinian Auth.*, 686 F. Supp. 2d 23, 28 (D.D.C. 2010), *aff'd on other grounds*, 642 F.3d 1088 (D.C. Cir. 2011); *Doe v. Nestle, S.A.*, 748 F. Supp. 2d 1057, 1116-1118 (C.D. Cal. 2010); *Corrie v. Caterpillar, Inc.*, 403 F. Supp. 2d 1019, 1026 (W.D. Wash. 2005), *aff'd on other grounds*, 503 F.3d 974 (9th Cir. 2007); *Doe v. Exxon Mobil Corp.*, 393 F. Supp. 2d 20, 28 (D.D.C. 2005), *appeal dismissed*, 473 F.3d 345 (D.C. Cir. 2007); *In re Terrorist Attacks on Sept. 11, 2001*, 392 F. Supp. 2d 539, 565 (S.D.N.Y. 2005), *aff'd on other grounds*, 538 F.3d 71 (2d Cir. 2008); *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1175 (C.D. Cal. 2005); *In re Agent Orange Prods. Liab. Litig.*, 373 F. Supp. 2d 7, 55-56 (E.D.N.Y. 2005), *aff'd on other grounds*, 517 F.3d 104 (2d Cir. 2008); *Arndt v. UBS AG*, 342 F. Supp. 2d 132, 141 (E.D.N.Y. 2004); *Friedman v. Bayer Corp.*, No. 99-CV-3675, 1999 WL 33457825, at *2 (E.D.N.Y. Dec. 15, 1999); *Beanal v. Freeport-McMoRan, Inc.*, 969 F. Supp. 362, 381-382 (E.D. La. 1997), *aff'd on other grounds*, 197 F.3d 161, 169 (5th Cir. 1999).

the TVPA extends to such entities. Indeed, the defendants in that case never challenged the notion of corporate liability. *See* Appellees Br. in No. 04-10234, 2004 WL 4976697 (11th Cir. May 17, 2004); *Bowoto*, 621 F.3d at 1126. When the issue of corporate liability was raised in *Romero v. Drummond Co.*, 552 F.3d 1303 (11th Cir. 2008), the court of appeals declared that *Aldana*—merely by allowing a suit against a corporation—had established "the law of [the] Circuit." *Id.* at 1315. *But see Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993) (*stare decisis* does not apply to decisions that "at most assume[ ]" an answer to a question without "squarely address[ing]" it). That the only circuit to read "individual" in the TVPA to encompass legal entities offered no reason for doing so speaks volumes about the implausibility of that interpretation.

B. Statutory Context Confirms That the TVPA Subjects Only Natural Persons to Liability

This Court does not read statutory terms in a vacuum. It examines words within their "statutory context." *Brown v. Gardner*, 513 U.S. 115, 118 (1994). Here, both the TVPA's repeated use of "individual" to mean natural person, and its contrasting use of "person" or "claimant" to encompass other entities, make Congress's intent particularly clear.

1. As the D.C. Circuit observed (Pet. App. 8a), the TVPA provision at issue uses the term "individual" no fewer than five times to describe either who may be held liable or who may be a victim:

> An *individual* who, under actual or apparent authority, or color of law, of any foreign nation—
>
> > (1) subjects an *individual* to torture shall, in a civil action, be liable for damages to that *individual*; or

> (2) subjects an *individual* to extrajudicial killing shall, in a civil action, be liable for damages to the *individual*'s legal representative, or to any person who may be a claimant in an action for wrongful death.

28 U.S.C. § 1350 note § 2(a) (emphasis added). The TVPA also uses "individual" six more times to refer to the victim in defining "torture." *Id.* § 3(b)(1).

Only a natural person can be a victim of extrajudicial killing or torture. In that context, therefore, "individual" can refer only to a natural person. And a "standard principle of statutory construction provides that identical words and phrases within the same statute should normally be given the same meaning." *Powerex Corp. v. Reliant Energy Servs.*, 551 U.S. 224, 232 (2007); *see also AT&T*, 131 S. Ct. at 1184-1185. Accordingly, the TVPA's use of "individual" to define who may be sued should encompass only natural persons as well.

While petitioners demote that canon to a mere "intuition," Pet. Br. 27, the canon carries particular force here. The "presumption that a given term is used to mean the same thing throughout a statute" is "surely at its most vigorous when a term is repeated within a given sentence." *Brown*, 513 U.S. at 118. In *Brown*, this Court found it "virtually impossible" to read "'injury'" as "laden with fault" when the same term was used elsewhere in the same sentence in a manner that implied no fault. *Id.* The inference of consistency is even stronger here, where Congress used "individual" four other times in the same sentence to refer to natural persons. *See Katz v. Comm'r*, 335 F.3d 1121, 1128 (10th Cir. 2003) ("We think it is not asking too much of the drafters of our nation's laws to say that if they use a term three times in the

same sentence, they should be sure that they intend to give it the same meaning each time.").

Petitioners urge that the canon "readily yields" to evidence of contrary congressional intent. Pet. Br. 27. But they point to no evidence comparable to that present in the cases they cite. In *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427 (1932), this Court held that "trade" had different meanings in two sections of the Sherman Act because the sections represented exercises of different congressional powers. *See id.* at 435. The Court deemed itself "free to interpret §3 dissociated from §1 as though it were a separate and independent act." *Id.* In *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581 (2004), the Court construed "age" to have different meanings in two separate provisions of the Age Discrimination in Employment Act. The Court explained that the *Atlantic Cleaners* exception to the presumption of uniform usage applies only where "'there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in *different parts of the act* with different intent.'" *Id.* at 595 (quoting *Atlantic Cleaners*, 286 U.S. at 433) (emphasis added). In that context, the Court held, the presumption of uniform usage should "relent[] when a word used has several commonly understood meanings among which a speaker can alternate in the course of an ordinary conversation, without being confused or getting confusing." *Id.* at 595-596.

Neither case involved a statute remotely like this one. The TVPA does not use the word "individual" in "different parts" of a lengthy statute. It uses the word *five times in one sentence*. Moreover, petitioners' construction hardly avoids "being confused or getting confusing." To the contrary, it would be very confusing to use the

term "individual" in a single sentence to refer alternately to natural persons and organizations. And unlike the two uses of "age" in the Age Discrimination in Employment Act, which both reflected "commonly understood meanings," the definition of "individual" that petitioners propose—natural persons and organizations excluding governmental entities—is not an accepted meaning of the term.

2. The conclusion that the TVPA uses "individual" to mean natural person is reinforced by the Act's contrasting use of the broader terms "person" and "claimant" when describing who may sue. Under the TVPA, potential plaintiffs include "any *person* who may be a claimant in an action for wrongful death." 28 U.S.C. §1350 note §2(a)(2) (emphasis added). And the Act requires dismissal if "the *claimant* has not exhausted adequate and available remedies." *Id.* §2(b) (emphasis added). "'[W]hen the legislature uses certain language in one part of the statute and different language in another,'" courts should "'assume[ ] different meanings were intended.'" *Sosa*, 542 U.S. at 711 n.9 (quoting 2A N. Singer, *Statutes and Statutory Construction* §46:06, at 194 (6th rev. ed. 2000)). Here, Congress used the broader terms "person" and "claimant" to describe potential plaintiffs but the narrower term "individual" to describe defendants and victims. Construing "individual" to mean natural persons rather than all "persons" or "claimants" respects Congress's decision to use different terms to describe different categories.

Petitioners contend that "no useful contrast can be drawn between the TVPA's uses of 'individual' and 'person'" because, they assert, only natural persons can be plaintiffs in wrongful death actions. Pet. Br. 29. Petitioners are mistaken. Employers paying compensation

for injury or death under the Longshoremen's and Harbor Workers' Compensation Act receive an assignment of any right "to bring an action for such wrongful injury or death." *Chapman v. Griffith-Consumers Co.*, 107 F.2d 263, 264-265 (D.C. Cir. 1939) (citing 33 U.S.C. §933(b)). State statutes similarly allow employers to pursue wrongful death claims. *See* N.Y. Workers' Comp. Law §29(2) (automatically assigning claim to "the person, association, corporation, or insurance carrier" paying the decedent's benefits); Alaska Stat. §23.30.015(c) (payment of compensation "operates as an assignment to the employer of all rights of the representative of the deceased to recover damages"); *Aetna Cas. & Sur. Div. of Aetna Life & Cas. Co. v. Sandy Hill Corp.*, 54 A.D.2d 222, 223 (N.Y. App. Div. 1976); *Croxton v. Crowley Maritime Corp.*, 758 P.2d 97, 98 (Alaska 1988). And in *La Reunion Aerienne v. Socialist People's Libyan Arab Jamahiriya*, 533 F.3d 837 (D.C. Cir. 2008), a partnership representing a group of insurers brought wrongful death claims against Libya under the terrorism exception to the Foreign Sovereign Immunities Act. *See id.* at 840-841.

Moreover, while petitioners insist that an estate "can neither sue nor be sued," Pet. Br. 29, at least one federal statute—one that petitioners contend should be read *in pari materia* with the TVPA, *id.* at 31-32—explicitly allows suits by estates. Under the Anti-Terrorism Act, "[a]ny national of the United States injured in his or her person * * * by reason of an act of international terrorism, *or his or her estate*, survivors, or heirs, *may sue* therefor in any appropriate district court of the United States." 18 U.S.C. §2333(a) (emphasis added).

Given the potential variation in treatment of wrongful death claims, Congress reasonably could have foreseen that a number of entities might be entitled to bring such

claims and crafted the plaintiff-related provisions of the TVPA broadly to accommodate all contingencies. By contrast, Congress used a different and narrower term—"individual"—to describe who may be a victim and who may be sued. Construing that term according to its ordinary meaning gives effect to Congress's drafting decisions. Petitioners' contrary interpretation defies them.

C. The Legislative History Confirms That Congress Deliberately Used the Term "Individual" To Limit the TVPA to Natural Persons

Consistent with the ordinary meaning of "individual," the legislative history makes clear that Congress deliberately used that term to limit the TVPA's coverage to natural persons. Congress did not merely use the term "individual" rather than "person" in the TVPA. It substituted the word "individual" for "person" for the precise purpose of excluding organizational liability.

1. Earlier versions of the Act provided a cause of action against any "person" who subjected another to torture or extrajudicial killing under color of foreign law. 132 Cong. Rec. 12,950 (1986) (text of S. 2528); *see* H.R. 4756, 99th Cong. (1986). But the House Committee on Foreign Affairs rejected that phrasing because it would have extended liability beyond natural persons. During the committee markup, Representative Leach proposed an amendment to "make it clear we are applying [the Act] to individuals and not to corporations." *Hearing and Markup on H.R. 1417 Before the H. Comm. on Foreign Affairs*, 100th Cong. 87 (1988) ("*1988 Hearings*"). The House counsel responded that this change would require only "a fairly simple amendment," as it would entail only "changing the word, 'person' to 'individuals' in several places in the bill." *Id.* at 88. "[T]he intention [of the amendment]," he noted, was "to limit the application of

this civil action so that only individuals who engaged in torture could be the defendants." *Id.* at 87. That change was consistent with Congress's purpose of ensuring that the United States would not become a "safe haven" for human rights violators. *See id.* at 86 (Rep. Yatron); pp. 40-41, *infra*.

The Committee then adopted that amendment by unanimous consent. *1988 Hearings* 88. The TVPA as enacted retained the term "individual," affording a cause of action against the responsible "individual" rather than "person." Pub. L. No. 102-256, § 2(a), 106 Stat. at 73.

There is thus no need to speculate about the reason for Congress's choice of the term "individual." Congress replaced "person" with "individual" to limit the category of those subject to suit under the statute to natural persons. While petitioners belittle the significance of that change, Pet. Br. 44, this Court has not hesitated to rely on such amendments when construing statutes: "Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-443 (1987) (quotation marks omitted); *see also Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200 (1974) (amendment before enactment "strongly militates against a judgment that Congress intended a result that it expressly declined to enact"); *Russello v. United States*, 464 U.S. 16, 23-24 (1983) (deletion of language in earlier version of bill presumed intentional). That canon is all but conclusive here.

2. Petitioners attribute a different rationale to Congress's use of the term "individual"—a desire to exclude *state* entities. Pet. Br. 43-44. As they note, the 1991 Senate Report explains that "[t]he legislation uses the term

'individual' to make crystal clear that foreign states or their entities cannot be sued under this bill under any circumstances: only individuals may be sued." S. Rep. No. 102-249, at 7 (1991). And the House Report confirms that "[o]nly 'individuals,' not foreign states, can be sued under the bill." H.R. Rep. No. 102-367, at 4 (1991); *see also* Pet. Br. 44-45 & nn.10-12 (similar floor statements and hearing testimony). But the ordinary meaning of "individual" achieves that goal by limiting the Act to natural persons—thereby excluding *both* state entities *and* other organizations. Congress's deliberate decision to use "individual" to exclude state entities thus confirms that Congress was using the term in that ordinary sense.

If Congress had intended to exclude only foreign state entities, it would have been easy enough to write the liability provision broadly and then explicitly exempt those entities. *See, e.g.*, 18 U.S.C. §2337(2) (barring actions against "a foreign state" or "an agency of a foreign state"). Alternately, Congress could have kept the term "person," which this Court has repeatedly construed not to include sovereigns (at least when referring to potential defendants). *See, e.g., Will v. Mich. Dep't of State Police*, 491 U.S. 58, 64-71 (1989); *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 778-788 (2000); *United States v. Cooper Corp.*, 312 U.S. 600, 604 (1941) ("[T]he term 'person' does not include the sovereign, [and] statutes employing the [word] are ordinarily construed to exclude it.").[13] Indeed, as this Court ex-

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[13] Petitioners' reliance (at 20) on *Pfizer, Inc. v. Government of India*, 434 U.S. 308 (1978), is misplaced. That case held that foreign states were "persons" entitled *to bring suit*. *Id.* at 315-318. As the Court noted, merely allowing a state to bring suit does not "interfere in sensitive matters of foreign policy." *Id.* at 319. Allowing a state *to be sued*, by contrast, does.

plained in *Ngiraingas v. Sanchez*, 495 U.S. 182 (1990), Congress amended the Dictionary Act's definition of "person" in 1874 precisely to make clear that it does not cover sovereigns. *See id.* at 190-191 ("'[T]he [former] provision [which included "bodies politic"] goes further than is convenient. It requires the draughtsman, in the majority of cases of employing the word 'person,' to take care that States, Territories, foreign governments, &c., appear to be excluded.'" (quoting 1 *Revision of the United States Statutes as Drafted* 19 (1872))).

Congress thus had ample means to exclude states, and only states, from the TVPA. Instead, Congress limited the Act's coverage to "individuals." That word choice certainly made it "crystal clear that foreign states or their entities cannot be sued." S. Rep. No. 102-249, at 7. But the way Congress excluded states was by limiting the Act's coverage to "individuals," *i.e.*, natural persons. Petitioners cite no instance in which Congress has used the word "individual" with the expectation that it would exclude foreign states and foreign states alone.

D. The TVPA's Extraterritorial Reach Cautions Against Departing from the Ordinary Meaning of "Individual"

This Court has long recognized a presumption against extraterritorial application of federal law. *See, e.g.*, *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991). For the same reasons, the Court has held that even expressly extraterritorial statutes should not be extended beyond their precise terms. In *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869 (2010), for example, the Court held that, "when a statute provides for some extraterritorial application, the presumption against extraterritoriality operates to limit that provision to its terms." *Id.* at 2883. And in *Microsoft Corp. v. AT&T*

Corp., 550 U.S. 437 (2007), the Court confirmed that, where a statute "specifically * * * extend[s] the reach of United States * * * law to cover certain activity abroad," courts must "resist giving the language * * * an expansive interpretation." *Id.* at 442, 455-456.

The Court should likewise resist the "expansive interpretation" petitioners urge here. The TVPA applies only to acts committed under color of foreign law and is thus squarely directed at extraterritorial conduct. *See* 28 U.S.C. § 1350 note § 2(a). By design, it "allow[s] individuals * * * to bring cases in Federal courts for damages resulting from extraterritorial acts." *1990 Hearings* 24. Because the Act addresses conduct under color of government authority, moreover, it routinely targets diplomatically sensitive matters. "[T]his Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations." *F. Hoffmann-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004). And courts should be "particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs." *Sosa*, 542 U.S. at 727.

The TVPA implicates precisely those concerns. As the State Department warned, "no other country has similar legislation," and the Act's "unilateral enactment of extraterritorial jurisdiction may well be perceived by other countries as * * * overreaching." *1990 Hearings* 24, 27. The State Department was "particularly concerned over the prospect of nuisance or harassment suits brought by political opponents or for publicity purposes," which threatened "significant problems for the Executive's management of foreign policy." *Id.* at 28. The Act also raised the prospect of retaliatory legislation by other na-

tions. *Id.* at 27-28; *see also id.* at 14-15 (Department of Justice making similar points).

Expanding the TVPA beyond its text to allow suits against legal entities increases those foreign policy risks exponentially. Allowing suits against corporations invites ideologically motivated plaintiffs to sue multinational companies for doing business with regimes they oppose. The risks are even greater where the suit targets a political entity like the Palestinian Authority. It is one thing for a federal court to entertain an action against an individual alleged to have abused authority granted to him by foreign law. It is quite another for a court to adjudicate claims that a political institution engaged in torture and extrajudicial killing as part of "a general policy * * * designed to terrorize [its own] population and to ensure that an elite * * * leadership circle is able to maintain power at all costs." C.A. App. A29, ¶57. Petitioners' construction would embroil courts in international issues they are properly loath to address.

II. Petitioners' Attempts To Evade The Ordinary Meaning Of "Individual" Are Unpersuasive

Petitioners do not ask this Court to disregard the ordinary meaning of a word in favor of a less common, but still accepted, meaning. They ask the Court to disregard the ordinary meaning of "individual" in favor of an alternative devoid of any support in customary or legal usage—units or groups possessing the attribute of "oneness" *except* state entities. None of petitioners' reasons for discarding ordinary meaning in favor of that gerrymandered alternative withstands scrutiny.

A. Limiting the TVPA's Scope to Individuals Does Not Produce Absurd Results

Petitioners cite a handful of cases to support their view that the term "individual" includes legal entities.

Pet. Br. 19-20. But those cases departed from the term's ordinary meaning only because doing so was necessary to avoid absurd results. Limiting the TVPA's scope to natural persons produces no such results. To the contrary, Congress had legitimate reasons to restrict the Act's coverage to natural persons.

1. Far from supporting petitioners' view, petitioners' lead case—*Clinton v. City of New York*, 524 U.S. 417 (1998)—forecloses it. *Clinton* addressed the categories of plaintiffs who could seek expedited review of the Line Item Veto Act. The Court agreed that, "in ordinary usage," the term "individual" refers to a human being, while the term "person" is broader: "Although in ordinary usage both 'individual' and 'person' often refer to an individual human being, 'person' often has a broader meaning in the law." *Id.* at 428 n.13 (citations omitted). *Clinton* nonetheless allowed artificial entities to proceed under a provision limited to "individuals" because failing to do so "would produce an absurd result." *Id.* at 429 n.14. Because of that prospect, the Court concluded that "Congress did not intend the result that the word 'individual' would dictate in other contexts." *Id.*

Justice Scalia's concurrence (joined by Justice O'Connor) agreed that "corporations, cooperatives, and governmental entities * * * are not 'individuals' under any accepted usage of that term." 524 U.S. at 454. He merely disagreed that that ordinary meaning produced an absurd result in that case. *Id.* at 454-455. Thus, no member of the Court suggested that the ordinary meaning of "individual" encompasses anything other than natural persons. The only dispute was whether that definition—which the text would otherwise "dictate," *id.* at 429 n.14 (majority opinion)—led to an "absurd result" that would

justify disregarding ordinary meaning. *See, e.g., Nixon v. Mo. Mun. League*, 541 U.S. 125, 138 (2004).

Petitioners' court of appeals cases are inapt for similar reasons. *United States v. Middleton*, 231 F.3d 1207 (9th Cir. 2000), interpreted a prohibition on hacking into computer systems of "one or more individuals" to encompass hacking into corporate computers. It did so because a contrary reading would have had the irrational result of exempting a large number of computers used in interstate and foreign commerce, contrary to Congress's intent. *See* 231 F.3d at 1210-1211.[14] The Ninth Circuit had no difficulty distinguishing *Middleton* when it construed the TVPA to exclude corporations in *Bowoto*, 621 F.3d at 1127. And while petitioners also invoke two cases interpreting the Bankruptcy Code's automatic stay provision, Pet. Br. 20, those cases are on the short end of a lopsided circuit split: The First, Second, Eighth, Ninth, and Eleventh Circuits have all rejected their interpretation. *See Spookyworld*, 346 F.3d at 8 (citing cases). Moreover, one of the two cases held that "a narrow construction of the term would defeat much of the purpose of the section," *Budget Serv. Co. v. Better Homes of Va., Inc.*, 804 F.2d 289, 292 (4th Cir. 1986), and the second case followed the first without any further analysis, *see In re Atl. Bus. & Cmty. Corp.*, 901 F.2d 325, 329 (3d Cir. 1990).

2. This case presents no such absurdity. Congress had every reason to exercise restraint by limiting the TVPA to natural persons. That limitation reduces the

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[14] In addition, the statute in *Middleton* used "individual" and "person" interchangeably. *See* 231 F.3d at 1210. Here, Congress carefully distinguished the two. *See* pp. 23-28, *supra*. Petitioners also cite *United States v. Perry*, 479 F.3d 885 (D.C. Cir. 2007), but the parties there stipulated to *Middleton*'s definition of "individual," so the D.C. Circuit had no occasion to address the issue. *Id.* at 893 n.10.

risk that ideologically motivated suits will be filed against corporations or political entities over diplomatically sensitive acts abroad. *See* pp. 32-33, *supra*. It reduces the risk that federal courts will become entangled in matters of foreign policy properly left to the Executive Branch. *See id.* And it helps ensure that American companies are not deterred from doing business in difficult regions where their engagement may serve U.S. foreign policy goals by promoting economic stability and democratic values. *See, e.g.*, Nat'l Security Council, *The National Security Strategy of the United States of America* 17 (2002). As this Court made clear in *Sosa*, great caution is warranted before "claim[ing] a limit on the power of foreign governments over their own citizens" and "hold[ing] that a foreign government or its agent has transgressed those limits." 542 U.S. at 727.

Restricting liability to natural persons also focuses the Act's impact on those who directly engage in the misconduct, and prevents the dilution of responsibility that occurs when liability is shifted. This Court relied on precisely those concerns when it held, in *Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001), that the implied *Bivens* cause of action does not apply to corporations. "[I]f a corporate defendant is available for suit," the Court noted, "claimants will focus their collection efforts on it, and not the individual directly responsible for the alleged injury." *Id.* at 71. "To the extent aggrieved parties had less incentive to bring a damages claim against individuals, the deterrent effects of the * * * remedy would be lost." *Id.* at 69 (quotation marks omitted).

Caution in imposing organizational liability is especially important where the defendant is a political entity, as litigation costs may divert resources from supporting citizens or providing basic infrastructure. Every dollar

the Palestinian Authority spends defending this action, for example, is one less dollar available for the education, security, and institution-building necessary to create economic opportunity and lasting stability. This Court exercised caution in declining to extend *Bivens* to corporations in *Malesko*. Congress's similar exercise of caution in declining to extend the TVPA to organizations can hardly be assailed as "absurd."

B. Construing the TVPA Consistent with Its Plain Meaning Serves the Act's Underlying Purposes

Contrary to petitioners' claims, reading the TVPA to impose liability only on the "individual" responsible for the misconduct amply serves the statute's purposes. In providing a civil remedy for torture and extrajudicial killing, Congress sought to "[s]trik[e] a balance between the desirability of providing redress for a victim and the fear of imposing additional burdens on U.S. courts." H.R. Rep. No. 102-367, at 4. It struck that balance by authorizing suit against only the public officials who actually carry out, authorize, or condone state-sponsored torture and are subject to jurisdiction in U.S. courts—ensuring that those who commit such acts do not find a safe haven from liability here.

1. Petitioners urge that suits against organizations are necessary because victims often cannot identify the responsible individuals. Pet. Br. 38-39. But the 20-year history of TVPA litigation belies that assertion. Even if plaintiffs do not know who personally inflicted the abuse, they often know the identity of more senior officials who authorized or condoned it. When such individuals have sought residence or otherwise appeared in the United States, victims or their families have successfully brought TVPA actions against them. *See, e.g., Chavez v. Carranza*, 559 F.3d 486 (6th Cir. 2009) (affirming a judgment

against an officer in the El Salvador armed forces); *Arce v. Garcia*, 434 F.3d 1254, 1258 (11th Cir. 2006) (holding that TVPA claims against El Salvadoran military leaders, which resulted in a $54.6 million jury verdict, were not time-barred); *Jean v. Dorelien*, 431 F.3d 776, 777-778 (11th Cir. 2005) (holding that the statute of limitations on a TVPA claim against a colonel in the Haitian Armed Forces was subject to tolling); Dkt. No. 55 in *Kpadeh v. Emmanuel*, No. 1:09-cv-20050-AJ (S.D. Fla. Feb. 5, 2010) (awarding plaintiffs approximately $22 million against Charles Taylor for atrocities committed during the Liberian civil war); *Doe v. Saravia*, 348 F. Supp. 2d 1112, 1159 (E.D. Cal. 2004) (awarding $10 million in an action against an El Salvadoran "death squad" officer).

Petitioners' position is not that the TVPA, properly construed, provides no meaningful remedies, but that it would provide more *expansive* remedies if it also allowed suits against organizations that have deep pockets and are more readily amenable to U.S. jurisdiction. But even if providing compensation were the Act's primary purpose, "no legislation pursues its purposes at all costs," and it "frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 525-526 (1987). Congress "[s]tr[uck] a balance" in the Act. H.R. Rep. No. 102-367, at 4. It did so by focusing liability on the individuals responsible for the torture or extrajudicial killing. And while petitioners urge that "[m]ost" acts of official torture and extrajudicial killing "are committed by organized groups rather than natural persons acting alone," Pet. Br. 42, *all* such acts are committed by the individuals through whom those organizations act. *See Braswell v. United States*, 487 U.S. 99, 110 (1988) ("Artificial entities * * * may act only through their agents * * * .").

Petitioners' theory that the Act must allow suit against organizations allegedly responsible for torture also defies the undisputed limits on the TVPA's scope. The organizations Congress identified as primarily responsible for state-sponsored torture and extrajudicial killing were *foreign governments themselves*. *See* H.R. Rep. No. 102-367, at 3 ("[M]any of the world's governments still engage in or tolerate torture of their citizens, and state authorities have killed hundreds of thousands of people in recent years."); S. Rep. No. 102-249, at 3 (noting that "more than one-third of the world's governments engage in, tolerate, or condone" torture and extrajudicial killing). Yet petitioners admit that Congress excluded state entities from liability. *See* pp. 20-21, *supra*.

Conversely, while petitioners repeatedly mention drug cartels, private militias, death squads, terrorist groups, and clans operating in failed states, Pet. Br. 35-36, 41-42, the TVPA does not address torture and extrajudicial killing by *private* actors, no matter how heinous. Consistent with *Filartiga*'s holding that it is only "an act of torture committed by a state official against one held in detention" that "violates established norms of the international law of human rights, and hence the law of nations," 630 F.2d at 880, the TVPA requires state action, 28 U.S.C. § 1350 note § 2(a).[15]

Petitioners' complaint thus reduces to the assertion that, although the TVPA excludes foreign states and state entities; although it excludes purely private parties;

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[15] Moreover, even assuming "death squads" and similar groups are state actors with juridical status, they would rarely have any jurisdictional presence in the United States. Petitioners' claim (at 39) that an expansive reading of the TVPA is necessary to enable suits against organizational defendants is thus unfounded as to the very type of defendants petitioners claim the TVPA intends to reach.

and although it always provides a cause of action against the responsible human beings who act for an organization, the TVPA's remedies would be inadequate unless they *also* reached organizations that are not states but nonetheless act under color of state authority. The notion that excluding that category of defendants would defeat the statute's purpose is fanciful.

2. In any event, petitioners mistake Congress's purpose when they claim that organizational liability is necessary because it is easier to "obtain personal jurisdiction in U.S. courts over organizational defendants than over specific human beings." Pet. Br. 39. Congress did not enact the TVPA so that U.S. courts could exercise long-arm jurisdiction over multinational corporations. It sought to prevent the United States from becoming a safe haven for individuals who engage in state-sanctioned torture or killing and then seek refuge in this country.

Senator Specter explained that the TVPA was "intended to deny torturers a safe haven in this country." 138 Cong. Rec. 4176 (1992) (Sen. Specter). "While human rights violators seldom present themselves to their victims while in the United States, providing victims of gross human rights abuses access to the courts * * * serve[s] notice to individuals engaged in human rights violations that the United States will not shelter human rights violators from being accountable." 137 Cong. Rec. 2671 (1991) (Sen. Specter). Many others echoed those views. *See, e.g.*, 135 Cong. Rec. 22,717 (1989) (Rep. Broomfield) (TVPA "declar[es] the United States off limits to those who would torture or murder their fellow human beings in foreign countries under the authority of foreign governments"); 137 Cong. Rec. 34,785 (1991) (Rep. Mazzoli) (TVPA "puts torturers on notice that they will find no safe haven in the United States").

Preventing torturers from seeking refuge here is a goal that sounds in distinctly human terms. It assumes that courts will exercise jurisdiction based on the individual's physical presence. As the Senate Report explains, an "individual must have 'minimum contacts' with the forum state, for example through residency here or current travel." S. Rep. No. 102-249, at 7. That requirement—again cast in distinctly human terms—confirms that Congress sought to reach individuals seeking refuge in this country, not corporations or other organizations operating around the world.[16]

3. Petitioners also invoke the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), Dec. 10, 1984, 1465 U.N.T.S. 85, 23 I.L.M. 1027, *as modified by* 24 I.L.M. 535. Pet. Br. 34-35. But they admit that the CAT "do[es] not [itself] compel relief under the precise circumstances here." Pet. Br. 34. Their claim that the TVPA should nevertheless be construed broadly in light of that treaty is misplaced.

The CAT's civil remedies provision requires only that "[e]ach State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation." Art. 14, 23 I.L.M. at 1030. Nothing in that language requires that liability extend beyond the individual who engages in or orders the misconduct. In connection with the ATS, the United States urges that international law may define substantive norms but leaves the appropriate

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[16] Precisely because the TVPA was "a limited measure," its proponents "estimated that only a few of these lawsuits will ever be brought." 137 Cong. Rec. 2671 (1991) (Sen. Specter); *cf.* 138 Cong. Rec. 4177 (1992) (Sen. Simpson) ("[T]his legislation will result in a very small number of cases.").

scope of any private cause of action to each state's domestic law. *See* U.S. Br. in *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491, at 27-28. Here, Congress addressed that issue by limiting potential defendants to the "individuals" who themselves engaged in or directed the misconduct.[17]

Indeed, the CAT does not require the TVPA's extraterritorial remedies *at all*. The Senate ratified the CAT with the express reservation that "Article 14 requires a State Party to provide a private right of action for damages only for acts of torture committed *in territory under the jurisdiction of that State Party*." 136 Cong. Rec. 36,193 (1990) (emphasis added). And the Executive Branch has been steadfast in its position that, while the CAT may contemplate the exercise of universal criminal jurisdiction, signatories are expected to provide a "private right of action *only* for acts of torture committed in the territory of that State party, not for acts of torture committed in other countries." *1990 Hearings* 26; *see also* Int'l Bar Ass'n, *Report of the Task Force on Extra-*

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[17] Petitioners' international sources (Br. 35) do not prove that the CAT contemplates organizational liability. *Sadiq Shek Elmi v. Australia*, U.N. Comm. Against Torture Commc'n No. 120/1998, U.N. Doc. CAT/C/22/D/120/1998 (May 25, 1999), stated only that "the members of" a Somali clan could "fall * * * within the phrase 'public officials or other persons acting in an official capacity' contained in article 1." *Id.* ¶6.5. And the Committee Against Torture merely listed "private contractors" along with "officials" and "agents" in describing the relationships that might establish conduct under color of law. U.N. Comm. Against Torture, General Comment No. 2, ¶15, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008). Neither source implies that signatories must hold corporations or other legal entities liable. The federal cases petitioners cite (at 35-36) are similarly inapposite: They addressed whether torturers were acting under color of law or with the acquiescence of a foreign government, not whether organizational entities may be sued.

territorial Jurisdiction 96 (2009) (reporting that the United Kingdom and Canada take the same view).

Petitioners' reliance (at 36) on Common Article 3 of the Geneva Conventions and the International Covenant on Civil and Political Rights ("ICCPR") is even farther afield. The United States has specifically refused to authorize private judicial enforcement of the ICCPR. *See Sosa*, 542 U.S. at 728. And both provisions govern the conduct of state parties—precisely the entities that petitioners agree are excluded from the TVPA. *See, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 3318-3320.

C. Neither the *In Pari Materia* Canon Nor Background Legal Principles Supports Petitioners' Position

Petitioners also urge the Court to depart from ordinary meaning based on a supposed "presump[tion] that the word 'individual' in the context of a tort action can and should include organizations." Pet. Br. 12. But that claim inverts rather than invokes standard principles of statutory construction. None of the other statutes petitioners identify uses the term "individual" to define who is liable. The TVPA, by contrast, does. This Court gives effect to Congress's intent by respecting differences in the statutes it enacts, not ignoring them.

1. "The rule of *in pari materia*—like any canon of statutory construction—is a reflection of practical experience in the interpretation of statutes: a legislative body generally uses a *particular word* with a consistent meaning in a given context." *Erlenbaugh v. United States*, 409 U.S. 239, 243 (1972) (emphasis added); *see also Marks v. United States*, 161 U.S. 297, 302 (1896). But the three statutes petitioners cite (at 30-33)—Section 1983, the Anti-Terrorism Act, and the Foreign Sovereign Immuni-

ties Act—all use different language from the TVPA precisely where it counts. The TVPA imposes liability on "individual[s]." 28 U.S.C. §1350 note §2(a). By contrast, Section 1983 imposes liability on "person[s]." 42 U.S.C. §1983. The state-sponsor-of-terrorism exception in the Foreign Sovereign Immunities Act permits suits against "foreign state[s]," defined to include political subdivisions, agencies, and instrumentalities. 28 U.S.C. §§1603(a), 1605A. And the Anti-Terrorism Act's civil liability provision does not define the class of potentially liable parties at all (although the statute excludes states and their officers from liability). 18 U.S.C. §§2333(a), 2337(2). Where, as here, provisions are "differently worded" and thus "of unlike character," the *in pari materia* canon is irrelevant. *United States v. Granderson*, 511 U.S. 39, 51 (1994).

In fact, Congress's deliberate decision to use different terms with different meanings reinforces the conclusion that Congress intended the statutes to have different scopes. "'[W]here a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant to show that a different intention existed.'" 2B N. Singer & J.D. Singer, *Sutherland Statutes & Statutory Construction* §51:2 (7th ed. 2008); *see also United States v. Bean*, 537 U.S. 71, 76 n.4 (2002) ("'The use of different terms within related statutes generally implies that different meanings were intended.'"). Congress's use of the word "individual" rather than alternative terms from other statutes underscores its intent to give the TVPA a narrower reach. That drafting decision is particularly telling given that Congress was keenly aware of the phrasing and scope of Section 1983 when it enacted the TVPA. *See* S. Rep. No. 102-249, at 8; H.R. Rep. No. 102-367, at 5.

Besides, this particular difference in coverage between the TVPA and the statutes petitioners cite is merely one of many. Under the TVPA and Section 1983, the defendant must be a state actor, 28 U.S.C. §1350 note §2(a); 42 U.S.C. §1983; under the Anti-Terrorism Act, he need not be, *see* 18 U.S.C. §2331(1). The FSIA expressly subjects foreign states to suit, 28 U.S.C. §1605A, while the TVPA and the Anti-Terrorism Act do not, *see* 18 U.S.C. §2337(2); pp. 29-30, *supra*. Ultimately, whatever "rift" exists between the TVPA and other statutes (Pet. Br. 33) is one that Congress deliberately devised and codified in the statutory text. "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank*, 503 U.S. at 253-254. By asking this Court to read the TVPA as if it used language from other statutes, petitioners ignore that principle.

2. Petitioners seek to tether this case to *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491, in which this Court will address corporate liability under the Alien Tort Statute. They urge that the TVPA should be construed to permit suits against legal entities if the ATS does so. Pet. Br. 33-34. As the United States explains, however, "the TVPA is distinct from the ATS in several respects. Most significantly, whereas the text of the ATS is silent as to the identity of the defendant, the TVPA confers a private right of action against an 'individual.'" U.S. Br. in No. 10-1491, at 27 n.16. A ruling allowing corporate liability under the ATS would thus in no way compel a similar interpretation of the TVPA.

Petitioners urge that construing the TVPA more narrowly than the ATS would handicap U.S. citizens, who may sue only under the TVPA. Pet. Br. 50. But petitioners err in assuming that aliens may continue to sue for

torture or extrajudicial killing under the ATS even though Congress has provided an express cause of action addressing such conduct in the TVPA. Where Congress establishes an express cause of action that "'speak[s] directly to [the] question' at issue," courts should not invoke their common law authority to provide different remedies. *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2537 (2011).[18] The ATS provides a jurisdictional grant for certain "common law actions derived from the law of nations." *Sosa*, 542 U.S. at 713-714, 721. By enacting the TVPA, however, Congress created an express cause of action for torture and extrajudicial killing under color of foreign law. 28 U.S.C. §1350 note §2(a). Congress carefully delineated the cause of action's scope, specifying an exhaustion requirement, a statute of limitations, and other restrictions. *See id.* §2(a)-(c). That express cause of action displaces whatever common law claims might have been cognizable under the ATS—for aliens and citizens alike. *Compare Enahoro v. Abubakar*, 408 F.3d 877, 884-885 (7th Cir. 2005), *with Aldana*, 416 F.3d at 1250-1251.[19]

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[18] Even where two *express* causes of action are at issue, a specific cause of action that is subject to limitations not found in a more general one precludes resort to the more general remedy. *See City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 121 (2005).

[19] The TVPA's legislative history confirms that Congress intended the ATS to remain available to address only norms not covered by the TVPA. *See* H.R. Rep No. 102-367, at 4 ("[C]laims based on torture or summary executions do not exhaust the list of actions that may appropriately be covered by section 1350. That statute should remain intact to permit suits based on *other norms* that already exist or may ripen in the future into rules of customary international law." (emphasis added)). Petitioners assert that Congress intended to "enhance and expand" the ATS, Pet. Br. 50, but the "expansion" it envisioned was the provision of a cause of action to U.S. citizens. *See* H.R. Rep. No. 102-367, at 4; S. Rep. No. 102-249, at 5.

This Court need not resolve that issue here, however. *Cf. Shell Petroleum N.V. v. Kiobel*, 132 S. Ct. 248 (2011) (denying review on that issue). Whatever the scope of available remedies under the ATS, this case involves only the TVPA, and the TVPA's plain text controls.

3. Petitioners also cite *Meyer v. Holley*, 537 U.S. 280, 285 (2003), for the proposition that Congress intends to incorporate "'ordinary tort-related * * * liability rules'" whenever it enacts a tort statute. Pet. Br. 12. "It is 'well settled' under U.S. law," they assert, that organizations may be held vicariously liable in tort for the acts of their agents. *Id.* at 13.

The short answer is that those arguments are waived. The D.C. Circuit expressly so held: Because petitioners had argued that "the defendants are secondarily liable for Rahim's death either pursuant to the principle of respondeat superior or for aiding and abetting his killer(s)" "for the first time" in "their reply brief," the argument "c[a]m[e] too late" and was "'waived.'" Pet. App. 10a. Petitioners did not argue secondary liability or seek review of that waiver ruling in their petition for certiorari. Nor did they challenge the waiver ruling in their opening brief. They have accordingly lost any right to challenge the ruling in this Court. *See Walters v. Metro. Educ. Enters., Inc.*, 519 U.S. 202, 205 n.* (1997).

In any event, petitioners overstate the presumption. For example, there is no vicarious liability for *Bivens* actions. *Malesko*, 534 U.S. at 70-71. Nor is there vicarious liability under Section 1983; municipalities are liable only if the challenged action "implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers" or reflects a "governmental 'custom.'" *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690-691 (1978).

More importantly, as petitioners concede, "'courts may take it as given that Congress has legislated with an expectation that the principle will apply *except when a statutory purpose to the contrary is evident.*'" Pet. Br. 12-13 (quoting *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991)) (emphasis added). Here, the TVPA expressly limits liability to "individual[s]," excluding organizations from liability under any theory. 28 U.S.C. §1350 note §2(a). The statute at issue in *Meyer*, by contrast, involved provisions of the Fair Housing Act that prohibited discrimination by "any person or other entity" and defined "[p]erson" to include "individuals, corporations, partnerships, associations, labor unions, and other organizations." 42 U.S.C. §§3602(d), 3605(a). The other statutes petitioners cite (at 14) use similarly expansive language. *See* 46 U.S.C. §30302 ("the person or vessel responsible"); 46 U.S.C. §30104 ("the employer"); 15 U.S.C. §§1692a(6), 1692k(a) ("any person"); 42 U.S.C. §1985 (conspirators liable for any conspiracy between "two or more persons"). If Congress had intended the TVPA—an extraterritorial statute with serious potential foreign policy implications—to reach a similarly broad range of defendants, it would have used similarly broad terms. That Congress deliberately chose not to makes the TVPA's meaning all the more unmistakable.

D. Legislative History Provides No Basis for Disregarding the Statute's Plain Meaning

Because the text of the TVPA is clear, the Court need not consider the statute's legislative history. *See Whitfield v. United States*, 543 U.S. 209, 215 (2005). "Legislative history, for those who take it into account, is meant to clear up ambiguity, not create it." *Milner v. Dep't of the Navy*, 131 S. Ct. 1259, 1267 (2011). Nonetheless, the TVPA's legislative history is not merely consistent with

the statutory text; it demonstrates that Congress used "individual" to exclude organizational liability. *See* pp. 28-31, *supra*. None of petitioners' citations proves otherwise.

1. Petitioners cite nothing in the House or Senate committee reports that evinces an affirmative intent to subject corporations or other organizations to liability. Nor could they. In describing the "[n]eed for legislation," the House Report explained that Judge Bork's concurrence in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), had "questioned the existence of a private right of action under the Alien Tort Claims Act." H.R. Rep. No. 102-367, at 3-4. The Second Circuit had recognized such a cause of action in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), an ATS suit against "a former inspector general of police, who had tortured to death a family member of the plaintiffs, and who was present in the United States." H.R. Rep. No. 102-367, at 3. While *Filartiga* "met with general approval," Judge Bork had "questioned whether section 1350 can be used by victims of torture committed in foreign nations absent an explicit [congressional] grant of a cause of action." *Id.* at 4. The TVPA was enacted to "provide such a grant" and to "extend a civil remedy also to U.S. citizens who may have been tortured abroad." *Id.*; *accord* S. Rep. No. 102-249, at 5.

In describing that cause of action, neither committee report suggests an intent to extend liability beyond "individuals" as that term is traditionally understood. The term "individual," moreover, is used throughout the reports to describe potential TVPA defendants, confirming that Congress's use of the term was deliberate. *See, e.g.*, S. Rep. No. 102-249, at 3 ("The purpose of this legislation is to provide a Federal cause of action against any indi-

vidual * * * ."); H.R. Rep. No. 102-367, at 4 (similar). In describing who may be liable without directly conducting the torture or extrajudicial killing, the Senate Report refers only to natural persons:

> [The Act] will not permit a lawsuit against a former *leader* of a country merely because an isolated act of torture occurred somewhere in that country. However, a *higher official* need not have personally performed or ordered the abuses in order to be held liable. Under international law, responsibility for torture, summary execution, or disappearances extends beyond the persons or person who actually committed those acts—*anyone with higher authority* who authorized, tolerated or knowingly ignored those acts is liable for them * * *. Finally, *low-level officials* cannot escape liability by claiming that they were acting under orders of superiors.

S. Rep. No. 102-249, at 8-9 (emphasis added). The Senate Report then provides examples of cases in which human beings were subject to liability under a command responsibility theory. *See id.* at 9. It also cites *Filartiga* and another suit against a natural person, *Forti v. Suarez Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987), with approval. S. Rep. No. 102-249, at 4.

Congress's singular focus on natural persons is similarly reflected in the discussions of personal jurisdiction and limitations periods. The Senate Report explains that, "for a Federal court to obtain personal jurisdiction over a defendant, the individual must have 'minimum contacts' with the forum state, for example through residency here or current travel." S. Rep. No. 102-249, at 7. Similarly, both reports state that the 10-year limitations period should be tolled "where the defendant has concealed *his* or *her* whereabouts or the plaintiff has been

unable to discover the identity of the offender." *Id.* at 11 (emphasis added); *accord* H.R. Rep. No. 102-367, at 5. Congress was thus clearly legislating with natural persons in mind.

2. To derive support for the contrary view, petitioners isolate and misread snippets of legislative history. For example, they read the reports' reference to *Tel-Oren v. Libyan Arab Republic*—in which the PLO was one of many defendants—to "demonstrate[] that Congress understood the Act to apply to organizations such as the PLO." Pet. Br. 47-48. But the lead defendant in that case was a foreign *state*—Libya. Petitioners acknowledge that Congress excluded foreign states from liability. *Id.* at 43-44. Clearly, therefore, Congress did not enact the TVPA to make the particular defendants in *Tel-Oren* liable.

Petitioners' suggestion that Congress targeted the PLO also defies the TVPA's express limitations. Echoing *Filartiga*'s observation that international law proscribes only "torture perpetrated under color of official authority," 630 F.2d at 878, the TVPA requires state action, imposing liability only for torture effected "under actual or apparent authority, or color of law, of any foreign nation," 28 U.S.C. § 1350 note § 2(a). But the PLO is not a state or a state actor, as Judge Edwards' concurrence in *Tel-Oren* makes clear. 726 F.2d at 791 ("The Palestine Liberation Organization is not a recognized state, and it does not act under color of any recognized state's law. In contrast, the Paraguayan official in *Filartiga* acted under color of state law, although in violation of it."); *see also Shafi v. Palestinian Auth.*, 642 F.3d 1088, 1091-1092 (D.C. Cir. 2011).

The committee reports do not "emphasize that the TVPA was intend to facilitate suits similar to *Tel-Oren*."

Pet. Br. 46. They emphasize that the TVPA was intended to facilitate suits similar to *Filartiga*, in which a human being was the defendant. H.R. Rep. No. 102-367, at 3-4; S. Rep. No. 102-249, at 4-5. The committee reports discuss *Tel-Oren* in the context of explaining that Judge Bork's concurrence had called into question whether suits similar to *Filartiga* could be maintained. *Id.* Neither report opines on whether the PLO should be subject to suit.

3. Petitioners also assert that Congress expected the Act to apply to "organizations," "groups," and "death squads." Pet. Br. 11, 48-49. But the discussions they cite address the state-action requirement, making it clear that purely private conduct is excluded. *See* H.R. Rep. No. 102-367, at 5 ("The bill does not attempt to deal with torture or killing by purely private groups."); S. Rep. No. 102-249, at 8 ("Consequently, this legislation does not cover purely private criminal acts by individuals or non-governmental organizations."). Neither report addresses whether the cause of action reaches only the individuals who engage in the conduct or extends further to the organizations for which the individuals act.[20]

In short, the legislative history does no more than confirm what the TVPA's text and every other indicator of congressional intent make clear: "Individual" means "individual"—a natural person.

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[20] The cited reference to "death squads" is particularly unpersuasive. The quoted passage cites a report that, in 1990 alone, there were 29 extrajudicial killings by death squads. *See* S. Rep. No. 102-249, at 3. But the same report also notes that "one-third of the world's governments engage in, tolerate, or condone such acts." *Id.* Under petitioners' logic, this reference to "the world's governments" would equally evince congressional intent to subject foreign *governments* to liability.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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JANUARY 2012

APPENDIX

APPENDIX

RELEVANT STATUTORY PROVISIONS

The Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note), provides:

An Act

To carry out obligations of the United States under the United Nations Charter and other international agreements pertaining to the protection of human rights by establishing a civil action for recovery of damages from an individual who engages in torture or extrajudicial killing.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Torture Victim Protection Act of 1991".

SEC. 2. ESTABLISHMENT OF CIVIL ACTION.

(a) LIABILITY.—An individual who, under actual or apparent authority, or color of law, of any foreign nation—

(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or

(2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

(b) EXHAUSTION OF REMEDIES.—A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.

(c) STATUTE OF LIMITATIONS.—No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose.

SEC. 3. DEFINITIONS.

(a) EXTRAJUDICIAL KILLING.—For the purposes of this Act, the term "extrajudicial killing" means a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.

(b) TORTURE.—For the purposes of this Act—

(1) the term "torture" means any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind; and

(2) mental pain or suffering refers to prolonged mental harm caused by or resulting from—

(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

(B) the administration or application, or threatened administration or application, of mind altering

substances or other procedures calculated to disrupt profoundly the senses or the personality;

(C) the threat of imminent death; or

(D) the threat that another individual will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.

Approved March 12, 1992.

REPLY BRIEF

No. 11-88

FEB 17 2012
CLERK

IN THE
Supreme Court of the United States

ASID MOHAMAD ET AL.,

Petitioners,

v.

PALESTINIAN AUTHORITY AND PALESTINE LIBERATION ORGANIZATION,

Respondents.

On a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONERS

According to respondents and the United States, Congress decided in the Torture Victim Protection Act (TVPA) to enact the first federal statute in the history of American law that categorically exempts organizations from liability for the torts of their agents. Not only that, but Congress did so under the most unlikely of circumstances – in a statute that addresses the most reprehensible conduct; with natural persons who are particularly difficult to hale into court and who, in any event, are typically judgment-proof; and where the need for organizational accountability is at its apex. And as if that were not baffling enough, Congress (assuming the Alien Tort Statute (ATS) is read the way the United States and the vast majority of federal courts of appeals interpret it) also denied American citizens the very right to sue organizations for torture and extrajudicial killing that aliens maintain.

The United States does not offer any reason why Congress could have intended these extraordinary anomalies. Respondents venture to explain them on two grounds, but neither is plausible. First, respondents note that the TVPA has extraterritorial reach. But numerous other federal tort-like statutes apply to conduct outside our borders – including conduct much like that at issue here – and those statutes always apply to organizations. Second, respondents contend that the TVPA is designed just to prevent torturers or killers from seeking safe haven in this country. But while that may be one ancillary benefit of the Act, the TVPA is not an immigration law. *It is a tort statute.* And the purpose of a tort statute is to provide meaningful

redress, deterrence, and accountability. The only way the TVPA can fulfill those goals is to cover organizations.

That leaves respondents and the United States with their argument that the TVPA's use of the word "individual" gives this Court no choice but to construe the statute in the unprecedented manner they advocate. Not so. Although the word "individual" often refers in ordinary usage to a human being, the term – particularly when used in the context of liability for violations of international law – can encompass entities. The structure of the TVPA allows for such a construction. And the legislative history squarely supports it. The House and Senate Committee Reports explain that Congress "use[d] the term 'individual' to make crystal clear that foreign states or their entities cannot be sued," S. Rep. No. 102-249, at 7 (1991); *accord* H.R. Rep. No. 102-367, at 4 (1991), not to exempt non-sovereign organizations from liability. The alternative history that respondents offer – in which Congress rejected organizational liability three years earlier by substituting "individual" for "person" at a markup hearing – is mere wishful thinking based on a single comment that few legislators ever knew about and that none ever credited. Indeed, the very committee that held the hearing at issue disseminated a report six days later treating the amendment as stylistic and using the words "person" and "individual" interchangeably. Under these circumstances, only the 1991 Committee Reports constitute reliable evidence of congressional intent, and those reports – which, unlike respondents' theory, are consistent with customary usage in the context of international norms – are decisive.

ARGUMENT

I. The TVPA's Word "Individual" Does Not Displace The Presumption Of Organizational Liability.

Respondents do not dispute that the meaning of the word "individual" depends on "context." Resp. Br. 23 (quoting *Brown v. Gardner*, 513 U.S. 115, 118 (1994)). Nor do respondents dispute that for over a century, Congress and courts have presumed that non-sovereign organizations "should be treated as natural persons for virtually all purposes of constitutional and statutory analysis," *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 687 (1978), particularly with respect to tort statutes, *see* Petr. Br. 12-17. Respondents nonetheless attempt to push aside that presumption and argue that the TVPA's use of the word "individual" so unequivocally excludes organizational liability that this Court "must" limit the statute's reach to human beings. Resp. Br. 15. Respondents' argument is unavailing.

A. Respondents suggest that Congress, in the TVPA, might have wanted to take the unprecedented step of exempting organizations from liability because (1) the Act applies extraterritorially, Resp. Br. 31-33; and (2) *Bivens* actions preclude liability for private entities, Resp. Br. 36-37, 47. Neither of these facts, however, undercuts the traditional reasons to expect Congress would have wanted organizational liability to apply in this context.

1. The presumption against extraterritoriality has no relevance here. Under that presumption, this Court assumes, absent evidence to the contrary, that federal statutes do not govern activity beyond U.S. borders. *See, e.g.*, *Microsoft Corp. v. AT&T Corp.*,

550 U.S. 437, 454-55 (2007). Thus, even when a statute applies to some degree extraterritorially, this Court does not apply it to conduct beyond the reach of its terms. *See id.* at 455-56. Here, however, there is no dispute that the TVPA not only applies extraterritorially but also governs the precise conduct at issue: torture and extrajudicial killing.

Contrary to respondents' suggestion, the presumption against extraterritoriality does not extend any further – that is, beyond regulation of *conduct* and into the realm of *liability*. There are numerous federal tort-like statutes that apply extraterritorially, and they *all* impose organizational liability. Among those statutes is the Anti-Terrorism Act (ATA), 18 U.S.C. § 2333. *See* Petr. Br. 31-32 (citing cases applying ATA to organizations including the PLO). Other such statutes abound. *See, e.g.*, Trafficking Victims Protection Reauthorization Act, 18 U.S.C. § 1595; *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 704 (1962) (Sherman Act); *W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp.*, 493 U.S. 400 (1990) (RICO, 18 U.S.C. §§ 1961 *et seq.*, and Robinson-Patman Act, 15 U.S.C. § 15). When Congress has enacted an extraterritorial statute governing the precise conduct at issue, organizational liability traditionally follows.

Respondents' plea to scratch organizational liability from the TVPA in order to avoid "embroil[ing] the courts in international issues," Resp. Br. 33, rings particularly hollow in the context of the TVPA. The Act is expressly designed to comport with "international agreements" prohibiting torture and extrajudicial killing, TVPA Preamble, Pub. L. No. 102-256, 106 Stat. 73 (1992), and it

defines those concepts according to internationally accepted norms, Petr. Br. 4. There is no risk, therefore, of any "clash[] between our laws and those of other nations." *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991).

2. The rules governing *Bivens* actions are equally irrelevant here. A *Bivens* action is "an implied private action" that is "not expressly authorized by statute." *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 66 (2001). As such, *Bivens* implicates the judiciary's ability to create a cause of action "where Congress has not provided one." *Malesko*, 534 U.S. at 66, 67 n.3. That concern, however, holds no sway under the TVPA, for Congress has expressly authorized the cause of action. In this situation, the presumption in *Monell* with respect to organizational liability controls: "[S]ince municipalities through their official acts could, equally with natural persons, create the harms intended to be remedied by [42 U.S.C. § 1983], and, further, since Congress intended § [1983] to be broadly construed, there is no reason to suppose that municipal corporations would have been excluded from the sweep of § [1983]." 436 U.S. at 685-86; *see also* S. Rep. No. 102-249, at 8 (directing courts construing the TVPA to consult Section 1983 case law "to give [the TVPA] the fullest coverage possible").

B. Respondents argue that (1) the ordinary meaning of "individual" and (2) usage of the term in statutes and opinions compels this Court to construe the TVPA as precluding organizational liability. Resp. Br. 15-20. Neither contention is correct.

1. Petitioners do not dispute that an ordinary meaning "individual" is human being. Rather, petitioners contend that another accepted use of the

word (especially when used alone and not directly in contrast to some kind of entity) encompasses organizations. Petr. Br. 17-18. That being so, this Court may construe the TVPA to follow that "secondary but recognized definition." *See Johnson v. United States*, 529 U.S. 694, 707 (2000); Petr. Br. 24.

Indeed – as petitioners previously emphasized, *see* Petr. Br. 20-21, 46-48, and as respondents do not deny – that is exactly how Judge Edwards repeatedly used the word in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), which provided the template for the TVPA. Citing and drawing on decades of international-law discourse, Judge Edwards used the term "individuals" to mean *any* non-sovereign actor – either "persons or groups," including "political entities." 726 F.2d at 792. He thus described the PLO's liability as raising a question concerning "individual liability," and concluded that "individuals acting under color of state law" should be subject to suit for torture or extrajudicial killing. *Id* at 792-95 (concurring opinion); *see also* Lyal S. Sunga, INDIVIDUAL RESPONSIBILITY IN INTERNATIONAL LAW FOR SERIOUS HUMAN RIGHTS VIOLATIONS 112-13 (1992) (discussing *Tel-Oren* as a case dealing with "individual" liability). Given that Congress legislated against that backdrop of usage, this conception of "individual" should control here, even if it deviates from another common meaning of the term. *See, e.g., Skilling v. United States*, 130 S. Ct. 2896, 2928-29 (2010); *Slack v. McDaniel*, 529 U.S. 473, 486 (2000).

This specialized usage in the context of international law also refutes respondents' claim that "no definition [of 'individual'] excludes states but does

not likewise exclude other entities." Resp. Br. 21; *accord* U.S. Br. 11. International law reference books define the word in precisely that way – as a term of art that distinguishes persons and entities from states, not human beings from entities. *See* John P. Grant & J. Craig Barker, ENCYCLOPÆDIC DICTIONARY OF INTERNATIONAL LAW 277-78 (3d ed. 2009) ("While international law was traditionally, and largely still is, the law governing the relations between States and created by States, it has increasingly been accepted that individuals have some status under international law."); 2 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 957-58 (1995) (The "main participants [in international law] are States," but "rules of international law [may] extend to individuals."). Accordingly, international law texts have long used the word "individual" – just as it appears in the TVPA – to address whether non-state entities have duties or rights under international law. *See, e.g.*, Carl Norgaard, THE POSITION OF THE INDIVIDUAL IN INTERNATIONAL LAW (1962); Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 AM. U. L. REV. 1 (1982).

Philip Jessup – a leading professor of international law, U.S. delegate to the United Nations, and later a judge on the International Court of Justice, on whose work this Court previously has relied, *see Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964) – put it most succinctly in 1952:

> In using the term "individual" in connection with the hypothesis [that non-states should be subject to certain international law norms], it should be understood that various

> types of groups or associations of individuals are included. . . . So long as national law creates these juristic persons, international law must deal with them as individuals.

Philip C. Jessup, A MODERN LAW OF NATIONS 19-20 (1952). That definition is still used today. *See, e.g.*, Mark Weston Janis, INTERNATIONAL LAW 247 (5th ed. 2008) ("There is little doubt that international law may sometimes apply to and its processes be available to individuals, that is to say, to private persons, in corporate as well as human form."). That accumulated usage should govern this case.

2. Even if uses of the term "individual" in statutes and judicial opinions outside of the context of international norms were also instructive here, they would not aid respondents.

The hedge in respondents' assertion that the word "individual" in federal statutes "*almost* invariably" means human being, Resp. Br. 1 (emphasis added), proves petitioners' point: the term is not always so restrictive. A tax statute, 26 U.S.C. § 542(a)(2), for example, provides that "an organization . . . shall be considered an individual." And this Court held in *Clinton v. City of New York*, 524 U.S. 417, 428-29 (1998), that Congress intended the word "individual" in the Line Item Veto Act – enacted not long after the TVPA – to encompass organizations.

Respondents' claim that statutes in all fifty states define "individual" in at least some context to mean natural person is no more persuasive. The TVPA lacks such a definition. And in the absence of definitional provisions, state courts repeatedly have construed the word "individual" to cover

organizations, corporations, and other entities. *See, e.g.*, *Morgan v. Galilean Health Enters., Inc.*, 977 P.2d 357, 362 n.16 (Okla. 1998) (in statute referring to who may be sued, "[t]he word 'individual' includes corporations"); *In re M.K.M.R.*, 199 P.3d 1038, 1042 (Wash. Ct. App. 2009) (relying on the Webster's definition of "individual" cited at Petr. Br. 18 to hold that "plain and ordinary meaning" of "individual" "encompass[es] a public entity"); *Cruze v. Nat'l Psychiatric Servs., Inc.*, 129 Cal. Rptr. 2d 65, 70 (Ct. App. 2003) ("That the Legislature in some other statutory contexts found it necessary to limit the term 'individuals' to 'natural persons' demonstrates that the term has a meaning broader than that," which includes non-natural entities.).

Still less compelling is respondents' observation that this Court sometimes uses the word "individual" in opinions on other subjects to distinguish a human being from an entity. Resp. Br. 16. The term is not always used that way, and that is not how the term is used in international law parlance. In *Tel-Oren*, Judge Edwards used the term in that context to refer to non-sovereign "persons or groups," including "political entities." 726 F.2d at 792 (concurring opinion). That is the usage that Congress consulted in drafting the TVPA and that should control here.

II. The Structure Of The TVPA And Its Relationship To Other Provisions Reinforce That It Covers Organizations.

Respondents contend that the structure of the TVPA, as well as its relationship to other domestic and international laws, precludes organizations from being held liable for the acts of their agents. Respondents are incorrect.

A. Neither the TVPA's repeated use of the term "individual" nor the Act's use of the word "person" dictates that the statute excludes organizations from liability.

1. Respondents implicitly concede – as they must – that statutes sometimes use the same word multiple times to mean different things. Resp. Br. 24. Indeed, this Court in *Clinton* held that the word "individual" encompassed organizations even though the Line Item Veto Act used the same term in another section to refer to natural persons. *See* 524 U.S. at 454 (Scalia, J., concurring). Respondents nevertheless claim that "[t]he inference of consistency" is stronger here because "Congress used 'individual' four other times in the same sentence to refer to natural persons." Resp. Br. 24.

Respondents' own position concerning an earlier version of the House bill that became the TVPA belies their argument. According to respondents, when the bill used the word "person" in all five places that the TVPA uses "individual," the bill applied to organizations as defendants, even though the uses of the word "person" to address victims referred only to natural persons. *See* Resp. Br. 28-29. If the meaning of "person" can vary according to usage – not only in the context of the TVPA but also in other statutes, *see* Petr. Br. 27-28 – then so can the meaning of "individual." *See also Barber v. Thomas*, 130 S. Ct. 2499, 2506-07 (2010) (rejecting argument that a phrase used three times in the same sentence meant the same thing each time).

2. Respondents also suggest that the TVPA draws an intentional contrast between "individual" and "person" because it uses the latter term to

describe a potential plaintiff in a wrongful death action and, according to respondents, such a plaintiff could be (a) an estate or (b) an employer. Resp. Br. 26-27. Respondents are mistaken on both counts.

a. This Court held over a century ago that "the estate of a decedent is neither a person nor a corporation. It can neither sue nor be sued." *Hess v. Reynolds*, 113 U.S. 73, 76 (1885). Instead, only "the executor, if there be a will, or the administrator, if one has been appointed," may technically appear as a party in a case involving rights or property of an estate. *Id.* Respondents ignore *Hess*, noting instead that the text of the ATA allows an injured person "*or his or her estate*, survivors, or heirs" to bring suit. Resp. Br. 27 (quoting 18 U.S.C. § 2333(a)) (emphasis added by respondents). But that statutory reference is merely shorthand for the right of an executor or administrator of an estate – people who are not otherwise mentioned in the statute – to bring an action. Thus, even where an ATA case caption appears to name an estate as a plaintiff, a careful look at the opinion itself or the complaint shows that the administrator or executor is the actual party. *See, e.g.*, *Estate of Klieman v. Palestinian Auth.*, 272 F.R.D. 253 (D.D.C. 2011); *Estates of Ungar v. Palestinian Auth.*, 315 F. Supp. 2d 164 (D.R.I. 2004).

Respondents' argument that an estate is a legal entity that can sue and be sued not only contravenes this Court's precedent as a general matter; it makes no sense under the TVPA. Under current law, a TVPA action against a natural person who dies during its pendency continues against the person's estate. *See In re Estate of Marcos Human Rights Litig.*, 910 F. Supp. 1460, 1461-62 (D. Haw. 1995);

Hilao v. Estate of Marcos, 103 F.3d 767, 776-78 (9th Cir. 1996). Under respondents' construction of the TVPA, however, such a death would render the case moot because the estate would be an entity exempt from suit. Surely Congress did not intend such an absurd result.

b. Nor is it plausible that Congress used the word "person" in the TVPA to allow an employer to bring an action. In order for an employer to bring a wrongful death action as an assignee, the tort must have occurred "in a U.S. harbor or in a place of employment *subject to state or federal workers' compensation laws*." U.S. Br. 18 (emphasis added). At the same time, the TVPA requires the conduct at issue to have occurred *under color of law of a foreign nation*. The suggestion that Congress used the word "person" to account for the possibility that these two requirements might coincide is so farfetched that it cannot be taken seriously.

B. The TVPA's relationship to other laws supports its application to organizations.

1. Respondents do not advance any reason why Congress would have wanted to hold organizations liable for torture or extrajudicial killing subject to Section 1983, the ATA, or 28 U.S.C. § 1605A, but *not* equivalent acts covered by the TVPA. Respondents nonetheless assert that the TVPA should be construed differently from those laws because those statutes contain language that more clearly contemplates organizational liability. Resp. Br. 43-44. But this argument stands the *in pari materia* canon on its head. The canon provides that words in statutes regulating the same thing should be construed harmoniously "[w]here the text permits,"

not where the text is identical. *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, 130 S. Ct. 2433, 2447 (2010); *see also Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 739 (1989) (Scalia, J., concurring) (same). Otherwise, the canon would have little use. The fact that like-minded statues besides the TVPA clearly apply to organizations indicates that the TVPA should, if possible, be construed the same way – not differently.

2. Holding that the ATS allows organizational liability would make the need to construe the TVPA in like fashion even more compelling. The United States and the vast majority of the federal courts of appeals recognize that the ATS allows organizational liability. Assuming that this Court ratifies this understanding, it would be preposterous to interpret the TVPA to give them a narrower and less effective remedy for suffering torture or extrajudicial killing than aliens have available.

To their credit, respondents do not argue to the contrary. Instead, respondents argue that the TVPA displaces the ATS, precluding organizational liability under either statute. Resp. Br. 46. But displacement turns on "congressional intent," *Fitzgerald v. Barnstable Sch. Comm'n*, 555 U.S. 246, 254-58 (2009), and Congress made it perfectly clear that it intended the TVPA to "*enhance* the remedy available under [the ATS]," not to displace it, H.R. Rep. No. 102-367, at 4 (emphasis added); *see also Sosa v. Alvarez-Machain*, 542 U.S. 692, 731 (2004) (TVPA "supplement[s]" ATS); *Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242, 1250-52 (11th Cir. 2005) (rejecting displacement argument); *Kadic v. Karadzic*, 70 F.3d 232, 241 (2d Cir. 1995) (same).

3. The TVPA's relationship to international law reinforces its coverage of organizations. While respondents argue that neither the Convention Against Torture nor other treaties require states to provide remedies against non-sovereign organizations that commit torture or extrajudicial killing under color of law, the U.N. Special Rapporteur on Torture disputes those claims here in his amicus brief. Even assuming the question whether international law *requires* the TVPA to apply to organizations is debatable, there can be no debate that the TVPA is designed to carry out the general "intent of the Convention Against Torture," S. Rep. No. 102-249, at 3, and "other international agreements pertaining to the protection of human rights," TVPA Preamble, Pub. L. No. 102-256, 106 Stat. 73 (1992). And as the United States emphasizes in *Kiobel v. Royal Dutch Petroleum Co.*, No. 10-1491, nothing in those treaties "contemplates[] a distinction between natural and juridical actors." U.S. Br. in *Kiobel* at 20-21 (citing CAT and Common Article 3 of the Geneva Conventions). Common Article 3, in fact, applies to non-sovereign, but armed groups such as the PLO at the time of the events at issue here. Consequently, the TVPA should do the same.

III. The TVPA's Purposes Make Clear That Congress Intended It To Cover Organizations.

As petitioners explained in their opening brief, the TVPA cannot hope to deliver meaningful redress, deterrence, and accountability – as federal tort statutes are designed to do – unless it reaches organizations. Petr. Br. 37-42. Respondents attempt

to counter this reality in three ways. First, they argue that the TVPA is really meant only to "prevent[] human rights violators from seeking safe haven in the United States." Resp. Br. 2, 37, 40. Second, respondents contend that even if the TVPA is designed to deliver redress, deterrence, and accountability, Congress did not wish to achieve these goals at ordinary levels. Resp. Br. 37. Third, respondents contend that even if the TVPA is designed to deliver redress, deterrence, and accountability at ordinary levels, allowing TVPA plaintiffs to sue natural persons alone meets those objectives. Resp. Br. 38. None of these arguments withstands scrutiny.

A. The TVPA is designed to do far more than deny safe haven to torturers and killers. Our immigration laws already do that. The Immigration and Nationality Act precludes anyone who has "committed, ordered, incited, assisted, or otherwise participated in the commission of" torture or extrajudicial killing from entering the United States. 8 U.S.C. § 1182(a)(3)(E)(iii); *see also id.* § 1227(a)(4)(D) (requiring removal for same).[1] Furthermore, a federal criminal statute permits prosecution of anyone "present in the United States, irrespective of the nationality of the victim or offender," who committed or conspired to commit torture "outside of the United States." 18 U.S.C § 2340A.

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[1] These particular immigration provisions postdate the enactment of the TVPA, but prior law likewise required such criminals to be excluded and deported. *See* 8 U.S.C. §§ 1182(a)(2)(A)(i)(I) & (h) (1990).

By contrast, the focus of the TVPA – as its title indicates – is on *victims* of torture and extrajudicial killing. The TVPA seeks to aid such people by means of "a civil action for recovery of damages." TVPA Preamble, Pub. L. No. 102-256, 106 Stat. 73 (1992); *see also* 137 Cong. Rec. H11244 (Nov. 25, 1991) (statement of Rep. Mazzoli) ("[A] criminal prosecution does not make a victim whole. The Torture Victim Protection Act complements what we did in the crime bill by allowing victims to obtain money damages from torturers in a civil cause of action."). In other words, the TVPA is unquestionably a tort statute like any other, aimed at redress, as well as deterrence and accountability.

B. The TVPA's goals of redress, deterrence, and accountability should be fully honored. Respondents assert that Congress "struck a balance" between furthering those goals and "'the fear of imposing additional burdens on U.S. courts.'" Resp. Br. 37 (quoting H.R. Rep. No. 102-367, at 4); *id.* at 38 (same). But respondents wrest this quotation out of context. The full sentence they quote from the House Report reads: "Striking a balance between the desirability of providing redress for a victim and the fear of imposing additional burdens on U.S. courts, the bill recognizes as a defense the existence of adequate remedies in the country where the violation allegedly occurred." H.R. Rep. No. 102-367, at 4. This passage obviously deals with the TVPA's exhaustion requirement. It has nothing to do with classes of defendants, nor does it signal the slightest intent to compromise the TVPA's goals of redress,

deterrence, and accountability as compared to other tort statues. Nor does anything else in the legislative history.[2]

C. This leaves respondents' argument that covering natural persons adequately serves the Act's purposes because plaintiffs "have successfully brought [five] TVPA actions" against foreign officials who authorized torture or extrajudicial killings. Resp. Br. 37-38. But petitioners' understanding is that only two of these "successful" plaintiffs have been able to collect on their judgments – in one instance, because the defendant happened to win the Florida lottery, *see Jean v. Dorelien*, 431 F.3d 776, 778 (11th Cir. 2005). These cases, therefore, actually underscore that the TVPA cannot perform its compensatory function – much less achieve its other goals of deterrence and accountability – without applying to organizations responsible for torture and killings.

The facts alleged in this further illustrate that actuality. According to the complaint, agents of respondents tortured and killed an American citizen

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[2] Like respondents, the United States asserts that the TVPA embodies a "policy balance." U.S. Br. 32. But the United States does not advance a single policy reason for limiting liability under the TVPA to natural persons. To the contrary, the Government says with respect to the ATS that "there is . . . *no good reason* to conclude that the First Congress would have wanted to allow [a] suit to proceed only against the potentially judgment-proof individual actor, and to bar recovery against the company on whose behalf he was acting." U.S. Br. in *Kiobel* at 24 (emphasis added). The same reasoning obviously applies here as well.

pursuant to an organizational policy of perpetrating such acts. C.A. App. A29 ¶ 57. Petitioners, however, were unable to serve process upon the natural persons who committed acts, Petr. Br. 6 n.3, much less obtain any judgment against them. Their only chance of enforcing the TVPA rests on their ability to sue respondents. *Id.* at 40-42.

IV. The History Of The TVPA Shows That Congress Intended To Exempt Foreign States, Not Non-Sovereign Organizations, From Liability.

This Court has "repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill." *Eldred v. Ashcroft*, 537 U.S. 186, 209 n.16 (2003) (quoting *Garcia v. United States*, 469 U.S. 70, 76 (1984)). And the Committee Reports on the TVPA could hardly be more instructive here. They explain – consistent with international-law usage – that "[t]he legislation uses the term 'individual' to make crystal clear that foreign states or their entities cannot be sued." S. Rep. No. 102-249, at 7; *accord* H.R. Rep. No. 102-367, at 4. Respondents nevertheless contend, for two reasons, that this language is not as devastating to their position as it appears. First, respondents attempt to recast the Reports' explanation of *why* Congress used the word "individual" as a mere observation concerning one aspect of the term's effect. Resp. Br. 29-30. Second, respondents argue that the Reports are trumped by a single legislator's suggestion three years earlier, during a markup hearing in a subcommittee of the House Committee on Foreign Affairs, that the word

"individual" excludes corporations. Resp. Br. 28-29. Neither argument withstands scrutiny.

A. Respondents' attempt to recast the meaning of the Committee Reports fails to come to grips with what the Reports say. The Reports do not merely observe that the word "individual" happens to exclude foreign states from the TVPA's reach. Rather, they explain Congress's *reason* for using the term "individual": "to make crystal clear that foreign states or their entities cannot be sued." S. Rep. No. 102-249, at 7; *accord* H.R. Rep. No. 102-367, at 4. That reasoning is perfectly sensible; as respondents themselves note, the word "person" only "ordinarily" excludes states. Resp. Br. 30 (quotation marks and citation omitted). By contrast, the word "individual," used in the context of liability for a violation of international law, is mutually exclusive with a state. *See supra* at 6-8.

B. Representative Leach's comment during the markup session three years earlier does not require any adjustment to this analysis of congressional intent.

1. The key question with respect to any legislative history is whether it sheds light on what legislators "understood" statutory text to mean "when they voted to enact it into law." *Bruesewitz v. Wyeth LLC*, 131 S. Ct. 1068, 1081 (2011). The mutually reinforcing 1991 Committee Reports on the TVPA, issued shortly before the House and Senate voted on the bill, unquestionably do so.

The relevance of earlier comments (including purported explanations for amendments) depends on whether other legislators were aware of, or relied upon, those comments. For instance, in *Edmonds v.*

Compagnie Generale Transatlantique, 443 U.S. 256 (1979), this Court rejected a purported understanding of a bill expressed at an earlier meeting because "subsequent legislative history d[id] not so much as hint" at such an understanding, and there was no other evidence "that the Senators and Representatives who voted for the [bill] when [it] reached the floor knew" anything about what had transpired at the earlier meeting. *Id.* at 273-74 n.32.

So too with Representative Leach's comment. Only four other congresspersons are reflected on the record as having been in the room when his remark was uttered. *See The Torture Victim Protection Act: Hearing and Markup on H.R. 1417 Before the Subcomm. on Human Rights & Int'l Orgs. of the H. Comm. on Foreign Affairs*, 100th Cong. 85-88 (1988). Thus, other committee members, as well as anyone else in Congress who wanted to learn what the subcommittee had done at the hearing, would have consulted the report it issued six days afterwards.

That report is not only silent about any purported limitation on who could be sued under the bill, but it uses the terms "person" and "individual" interchangeably, repeatedly stating that the bill would "provid[e] a civil action for recovery from *persons* engaging in torture." H.R. Rep. No. 100-693, at 1 (1988) (emphasis added); *id.* at 2 ("Any person who" tortured or killed under color of law "would be liable."); *id.* at 3 ("New section 10(a) provides that persons" who commit torture or killing may be sued.); *id.* ("Any *person* who committed one of the specified offenses . . . may be liable. . . . The *individual* must be subject to . . . jurisdiction." (emphasis added)). Subsequent reports on the amended House bill

likewise used the words "person" and "individual" interchangeably. *See* H.R. Rep. No. 101-55, at 1 (1989) (TVPA would "provid[e] a civil action for recovery from *persons* engaging in torture") (emphasis added); *id.* at 4 (bill "authorizes the Federal courts to hear cases brought by or on behalf of a victim of any *individual* who, under color of law of any foreign nation, subjects any *person* to torture or extrajudicial killing"); H.R. Rep. No. 102-367, at 4 (same).

The 1990 hearing before a subcommittee of the Senate Judiciary Committee confirms that no one understood the House language to preclude organizational liability. At that hearing, the subcommittee considered the amended House bill, which used the word "individual," and the Senate bill, which used the word "person." *Torture Victim Protection Act of 1989: Hearing on S. 1629 and H.R. 1662 Before the Subcomm. on Immigration and Refugee Affairs of the S. Comm. on the Judiciary*, 101st Cong. 2-7 (1990). If, as respondents contend, the House bill excluded organizational defendants from its reach, one would have expected someone to have exhibited some awareness of – not to mention offered some opinion on – that key difference from the Senate bill. Yet not one senator did, in 84 pages of single-spaced discussion and prepared submissions. Nor did the Government, which supplied detailed oral and written testimony from the Office of Legal Counsel and the State Department. *See id.* at 8-16, 18-29. To the contrary, the State Department's representative indicated that they understood the bills' reach to be synonymous, stating that "[w]e understand that *under either version of the act*, the prospective defendant must be found in

the United States or otherwise submit himself *or itself* to U.S. jurisdiction." *Id.* at 20 (oral testimony) (emphasis added); *accord id.* at 28-29 (prepared testimony). Nor did any of the other witnesses – all human rights experts who offered careful feedback about various words and phrases in the bills – suggest any difference in scope between the two bills. *Id.* at 35-60, 77-84.

In short, this is not a case – as respondents would like – of Congress discarding certain language in favor of a different rule. *See* Resp. Br. 29 (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987)). Instead, when Congress voted, it believed "person" and "individual" had similar meanings, and it used the latter term simply because it more clearly excluded foreign states from liability.

2. Congress's favorable references to the claims the plaintiffs brought in *Tel-Oren* – as well to "organizations," "groups," and other entities as potential defendants – further evince Congress's assumption that the TVPA would cover non-sovereign organizations such as the PLO. Petr. Br. 46-49. Respondents offer two responses to these references, but neither has merit.

First, respondents assert that the "lead defendant" in *Tel-Oren* "was a foreign *state* – Libya." Resp. Br. 51. But Libya was merely the first defendant named in the case's caption. The PLO was the primary wrongdoer, and all agreed that Libya was immune from suit, so the judges' opinions were "limited to the allegations against the Palestine Liberation Organization." *Tel-Oren*, 726 F.2d at 775 n.1 (Edwards, J., concurring).

Second, respondents argue that Congress could not have intended the TVPA to allow lawsuits against organizations because the PLO and other groups that Congress mentioned do not act under color of law. Resp. Br. 51-52. Respondents again are mistaken. Although the TVPA's state action requirement is not at issue here, U.S. Br. 9 n.2, the policing and security-related actions taken by the PA and the PLO are under color of law due to the quasi-governmental status and activities of those entities. *See Kadic*, 70 F.3d at 245 (actions taken pursuant to purportedly "official authority" constitute state action, even if the regime is not recognized by United States).[3] Other non-sovereign entities akin to those the legislative history mentions likewise have been treated as state actors. *See, e.g.*, *Tachiona v. Mugabe*, 169 F. Supp. 2d 259, 315 (S.D.N.Y. 2001) (Robert Mugabe's political party); *Estate of Rodriquez v. Drummond Co.*, 256 F. Supp. 2d 1250, 1265, 1268 (N.D. Ala. 2003) (Colombian paramilitary unit).

In light of the heinous acts such groups sometimes commit, Congress had every reason to want to hold them accountable for the conduct of their agents. This Court should not construe the TVPA categorically to thwart that objective.

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[3] To be sure, Judge Edwards did not believe in *Tel-Oren* that the PLO had acted under color of law. 726 F.2d at 776 (concurring opinion). But the events at issue there occurred in 1978, long before the Oslo Accords between Israel and the PLO created the PA and gave these entities governing authority.

CONCLUSION

The judgment of the court of appeals should be reversed.

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February 17, 2012

AMICUS CURIAE BRIEF

No. 11-88

In the Supreme Court of the United States

ASID MOHAMAD, INDIVIDUALLY AND FOR THE ESTATE OF AZZAM RAHIM, DECEASED, ET AL., PETITIONERS

v.

PALESTINIAN AUTHORITY, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING AFFIRMANCE

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QUESTION PRESENTED

Whether the Torture Victim Protection Act of 1991, 28 U.S.C. 1350 note, which establishes a right of action against "[a]n individual" for certain acts of torture or extrajudicial killing, permits actions against defendants that are not natural persons.

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In the Supreme Court of the United States

No. 11-88

ASID MOHAMAD, INDIVIDUALLY AND FOR THE ESTATE OF AZZAM RAHIM, DECEASED, ET AL., PETITIONERS

v.

PALESTINIAN AUTHORITY, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING AFFIRMANCE

INTEREST OF THE UNITED STATES

This case presents the question whether the Torture Victim Protection Act of 1991 (TVPA), Pub. L. No. 102-256, 106 Stat. 73 (1992) (28 U.S.C. 1350 note), permits civil actions against defendants that are not natural persons. Because the TVPA creates a cause of action for torture or extrajudicial killing under color of foreign law, it has significant implications for the United States' foreign relations, including its strong interest in promoting the protection of human rights. The United States has also filed an amicus brief in *Kiobel* v. *Royal Dutch Petroleum Co.*, No. 10-1491, which is to be argued in tandem with this case.

STATUTORY PROVISIONS INVOLVED

The TVPA and other relevant statutory provisions are reprinted in an appendix to this brief. App., *infra*, 1a-5a.

STATEMENT

1. Before the TVPA was enacted in 1992, no federal statute provided a civil right of action for a U.S. citizen who was the victim of torture or extrajudicial killing that occurred outside the United States. It was also unclear whether aliens could bring such claims under the Alien Tort Statute (ATS), 28 U.S.C. 1350, which provides for jurisdiction over a suit "by an alien for a tort only, committed in violation of the law of nations." In *Filartiga* v. *Pena-Irala*, 630 F.2d 876 (1980), the Second Circuit had held that jurisdiction could be exercised under the ATS over a suit by Paraguayan citizens alleging torture by a Paraguayan official. In *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774 (1984), cert. denied, 470 U.S. 1003 (1985), however, the D.C. Circuit had affirmed, without controlling opinion, the dismissal of ATS claims filed by Israeli citizens against, *inter alia*, the Palestine Liberation Organization (PLO) for a terrorist attack on a civilian bus in Israel. Judge Edwards concluded that torture by non-state actors was not covered by the ATS, *id.* at 791-795, while Judge Bork found that there was no express private cause of action for claims of torture under the ATS or international law, *id.* at 798-823.

To address concerns about a cause of action and remedies for U.S. citizens, the TVPA establishes liability for certain claims of torture or extrajudicial killing. It provides in relevant part as follows:

> An individual who, under actual or apparent authority, or color of law, of any foreign nation—
>
> (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or
>
> (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

TVPA § 2(a) (28 U.S.C. 1350 note) (hereinafter cited without references to the U.S. Code).

The TVPA differs from the older, less-detailed ATS in several ways in addition to its focus on torture and extrajudicial killing. Unlike the ATS, it does not limit the class of plaintiffs to aliens. The TVPA also contains two procedural restrictions that the text of the ATS itself does not: a ten-year statute of limitations, and a requirement that a plaintiff first "exhaust[] adequate and available remedies in the place in which the conduct giving rise to the claim occurred." TVPA § 2(b)-(c). And, of principal importance here, the TVPA specifies who may be liable. Although the version of the TVPA that was initially introduced would have applied to a "person" who committed torture or extrajudicial killing, the text was amended in a markup session of the House Committee on Foreign Affairs to specify that liability is imposed on an "individual." H.R. Rep. No. 693, 100th Cong., 2d Sess. Pt. 1, at 1 (1988); *The Torture Victim Protection Act: Hearing and Markup Before the H. Comm. on Foreign Affairs and Its Subcomm. on Human Rights and Int'l Orgs.*, 100th Cong., 2d Sess. 82, 87-88 (1988) (*House Hearing*). That change was made at the request of one

of the bill's three original sponsors (Rep. Leach), who wanted "to make it clear we are applying it to individuals and not to corporations." *Id.* at 81, 87. The House Judiciary Committee—to which the bill was also referred—made similar amendments. See *id.* at 88 n.1, 111. Congress ultimately enacted the House version, using "individual" rather than "person."

2. Petitioners are the widow and sons of Azzam Rahim, a Palestinian born in the West Bank who became a naturalized United States citizen after moving here in the 1970s. Pet. App. 2a-3a. They allege that when Rahim was visiting the West Bank in 1995, Palestinian intelligence officials arrested him and took him to Jericho, where he was imprisoned, tortured, and ultimately killed on September 29, 1995. *Id.* at 3a.[1] On September 27, 2005, petitioners brought this suit against three high-ranking Palestinian officials and against respondents, the Palestinian Authority and the PLO. Petitioners asserted claims of torture and extrajudicial killing under the ATS, the TVPA, and federal common law. *Id.* at 16a & n.1, 19a.

3. The district court granted respondents' motion to dismiss, Pet. App. 14a-21a, holding, as relevant here, that the TVPA's authorization for suit against an "individual" includes "only human beings, and does not encompass [respondents]." *Id.* at 17a.

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[1] The State Department later reported that Rahim "died in the custody of [Palestinian Authority] intelligence officers in Jericho" and that "[t]hree intelligence officers were sentenced for their role in the case," two of them for one year and one for seven years. U.S. Dep't of State, *Country Reports on Human Rights Practices for 1995*, J. Comm. Print of H. Comm. on Int'l Relations and S. Comm. on Foreign Relations, 104th Cong., 2d Sess. 1183-1184 (Apr. 1996).

4. The court of appeals affirmed. Pet. App. 1a-13a. With respect to petitioners' TVPA claim, it concluded that, because the TVPA uses the term "individual," it provides a right of action against only natural persons. *Id.* at 6a-10a. The court found that the "ordinary meaning" of *individual* "encompasses only natural persons and not corporations or other organizations," and further that the Dictionary Act "strongly implies" that the term *individual* "does not comprise organizations," because it defines "person" to include "'corporations, companies, associations, firms, partnerships, societies, . . . *as well as individuals.*'" *Id.* at 7a (quoting 1 U.S.C. 1 and adding emphasis).

The court of appeals rejected petitioners' contention that the TVPA, despite its different wording, should be construed *in pari materia* with the ATS, which petitioners contended allows actions against non-natural persons. Pet. App. 8a. Without considering whether the ATS permits such suits—a question now pending before this Court in *Kiobel*, *supra*—the court held that petitioners' argument is foreclosed by the TVPA's structure. The court explained that Section 2(a) of the TVPA uses the term *individual* five times; that four of those uses refer to the victim, who "could be only a natural person"; and that there is no reason to think the term "has a different meaning" in the fifth appearance, where it refers to "the perpetrator." *Id.* at 8a-9a. The court also noted that the TVPA uses the broader term *person* when referring to one "who may be a claimant in an action for wrongful death." *Id.* at 9a (quoting TVPA § 2(a)(2)). "[B]ecause a claimant could be a non-natural person, such as the decedent's estate," the court reasoned that the appearance of *person* "further supports the signifi-

cance" of Congress's use of *individual* to identify "who may be sued under the TVPA." *Ibid.*

Because neither respondent is a natural person, the court of appeals affirmed the dismissal of petitioners' TVPA claims against them. Pet. App. 10a-11a.

SUMMARY OF ARGUMENT

The TVPA limits liability under its right of action to "individual[s]" who torture or kill extrajudicially. TVPA § 2(a). As a result, non-natural persons are not liable.

A. 1. The ordinary meaning of "individual" is "a human being." In both common and legal usage, the term excludes non-natural persons. It thus differs from "person," which, as the Dictionary Act shows, is commonly used in federal statutes to include not only "individuals" but also entities like "corporations" and "associations." 1 U.S.C. 1.

2. The TVPA's structure reinforces the conclusion that Congress employed "individual" in its ordinary sense. The word appears five times in one sentence. TVPA § 2(a). Four are references to the victim of torture or extrajudicial killing, who must be a natural person. There is no basis for concluding that the fifth reference (to the perpetrator) reflects a shift to a definition that includes artificial persons.

The TVPA also uses the broader term "person" in making the perpetrator of an extrajudicial killing liable to "any person who may be a claimant" in a wrongful-death action. TVPA § 2(a)(2). Use of that distinct term indicates that a non-natural person may be a plaintiff in that limited category of cases and contrasts with the use of "individual" everywhere else in Section 2(a).

3. Other statutes show that when Congress establishes civil liability for both individuals and entities, it

does not use the term "individual." The same Congress that enacted the TVPA provided for civil suits about terrorism against "any person," which it defined as including both "individual[s]" and "entit[ies]." 18 U.S.C. 2331(3), 2333, 2334(a)-(b). By further providing that such actions could not be maintained against a "foreign state" or "agency of a foreign state," 18 U.S.C. 2337(2), Congress disproved petitioners' contention that it uses "individual" rather than "person" to include nongovernmental organizations and exclude only foreign states.

B. 1. The TVPA's legislative history shows no intention to establish liability for non-natural persons. The House Committee on Foreign Relations deliberately changed the text of the liability provision by substituting "individual" for "person," to "make it clear," in the words of one of the bill's three original sponsors, that "we are applying it to individuals and not to corporations." *House Hearing* 87-88. Petitioners rely (Br. 43) on later committee reports, which noted that use of the term "individual" precluded suits against "foreign states" and "their entities," but that observation is consistent with, and a logical consequence of, the use of "individual" to exclude all organizational entities, including nongovernmental ones.

2. Petitioners assert that Congress "[e]xpressly [a]ssume[d]" that "non-sovereign organizations would be subject to the TVPA," Br. 46, but most passages they identify in the legislative history referred to versions of the bill that used "person" rather than "individual." Although petitioners invoke (Br. 47-48) Congress's desire to respond to Judge Bork's concurring opinion in *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), cert. denied, 470 U.S. 1003 (1985), by providing an express cause of action that was lacking under the

ATS, that response was necessary for suits against natural persons as well, and therefore does not show that Congress sought to reach non-natural persons.

C. Petitioners advance several policy arguments, but none of them suffices to override the clear statutory text. Traditional principles of agency and tort law do not establish organizational liability here, because Congress expressly chose to make only "individual[s]" liable. While petitioners invoke several international agreements prohibiting torture, they do not speak to the meaning of the term "individual," and petitioners acknowledge, in any event, that those agreements do not require organizational liability in these circumstances.

Finally, that a corporation can be held liable in a federal-common-law action based on the ATS (as the United States has argued in *Kiobel* v. *Royal Dutch Petroleum Co.*, No. 10-1491) does not alter the appropriate result here. While there may be circumstances in which aliens could bring suit and U.S. citizens could not, such differences are unavoidable, because the TVPA is substantively and procedurally different from the ATS in several ways. This Court should not upset the policy balance reflected in the text of the TVPA.

ARGUMENT

BECAUSE THE TVPA MAKES ONLY "AN INDIVIDUAL" LIABLE, IT DOES NOT REACH NON-NATURAL PERSONS

A. The Text And Structure Of The TVPA Demonstrate That Only Natural Persons Are Liable

The TVPA creates a right of action against an "individual" who, under actual or apparent authority, or color of law, of a foreign nation, "subjects an individual" to

torture or extrajudicial killing. TVPA § 2(a).[2] Because the statute does not define "individual," the Court should "look first to the word's ordinary meaning." *Schindler Elevator Corp.* v. *United States ex rel. Kirk*, 131 S. Ct. 1885, 1891 (2011); see *Gross* v. *FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2350 (2009) ("Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose.") (citation omitted).

1. The ordinary meaning of "individual" is "a human being"

a. In light of the statutory context—in which an individual subjects another individual to torture or extrajudicial killing—the applicable definition of the noun "individual" is "[a] human being, a person," used "[w]ithout any notion of contrast or relation to a class or group." 7 *Oxford English Dictionary* 880 (2d ed. 1989) (*OED*). The *OED* provides an illustrative quotation, especially apt here, from Samuel Johnson: "Only one individual was injured by another." *Ibid.* Other dictio-

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[2] Respondents have noted (Br. 10 n.7, 12 n.8) a potential alternative ground for affirming the judgment: that the torture and extrajudicial killing alleged here were not done "under actual or apparent authority, or color of law, of any foreign nation," TVPA § 2(a). The United States does not recognize respondents as being the government of a foreign state, but it does not believe that the Court should address (or has any need to address) that alternative ground. The issue was not addressed by the court of appeals. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005). It is outside the scope of the question presented (Pet. Br. i), the Court did not accept respondents' suggestion (Br. in Opp. 15) to add the issue if it granted certiorari, and respondents do not press the issue in their merits brief. Moreover, unnecessary consideration of that issue could implicate sensitive foreign-policy interests of the United States.

naries contain materially identical definitions. See *American Heritage Dictionary* 893 (4th ed. 2006) ("A person."); *Random House Webster's Unabridged Dictionary* 974 (2d ed. 2001) ("a person"); *Webster's Third New International Dictionary* 1152 (1986) ("a particular person"); *Webster's New International Dictionary* 1267 (2d ed. 1958) ("A single human being; a person; primarily, a member of a human group or society, or of the human species").[3]

Petitioners seize instead (Br. 17-18) on a different set of definitions, which refer, in the *OED*'s phrasing, to "[a] single object or thing, or a group of things forming a single complex idea, and regarded as a unit; a single member of a natural class, collective group, or number." 7 *OED* 879. Petitioners quote only one of the *OED*'s examples of that usage, which is cryptic but does mention "a partnership, company, or corporation of traffickers" as "aggregate unit[s]" that might offer to sell stock. *Id.* at 880.[4] Another of the *OED*'s examples of that

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[3] The dictionaries also attest to a closely related definition of "individual": "a single human being as contrasted with a social group or institution." *Webster's Third New International Dictionary* at 1152. As the *American Heritage Dictionary* explains in a usage note (at 893), "there have been numerous objections to the use of the word to refer simply to 'person' where no larger contrast is implied," but that less-favored usage (the one advanced in the text above) is "common in official statements." (In federal statutes, it is common because Congress cannot safely use "person" when it means only "human being," see 1 U.S.C. 1.) In any event, the preferred usage (including the connotation of contrast) would be identical for purposes of this case, because it still involves "[a] single human" and not non-natural persons. *American Heritage Dictionary* at 893.

[4] The example petitioners quote (Br. 18) reads in full: "[The word 'Capital'] should be distinguished, first, as the aggregate saving of a community; next, as the stock which each individual possesses, and

usage refers to "herds of giraffes containing thirty individuals." *Ibid.* (brackets omitted).

Petitioners' dictionary definitions are not only inapposite but also inapplicable to their own theory about the TVPA. They explain (Br. 18) that their definitions emphasize "the *oneness* of something." They also contend (Br. 20) that Congress chose to use "individual" rather than "person" because it "more clearly excludes [foreign] states, but still encompasses other non-natural entities." That choice, however, could not be explained by petitioners' definitions, because respondents do not differ from foreign states in their degree of "oneness."

b. Consistent with the applicable definitions discussed above, legal usage commonly equates "individual" with "natural person." See *Black's Law Dictionary* 773 (6th ed. 1990) ("As a noun, this term denotes a single person as distinguished from a group or class, and also, very commonly, a private or natural person as distinguished from a partnership, corporation, or association[.]").[5] Thus, federal statutes routinely distinguish

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which he offers for sale or exchange. In the latter sense, it makes no practical difference whether the individual be a numerical unit, or an aggregate unit, as a partnership, company, or corporation of traffickers." James E. Thorold Rogers, *A Manual of Political Economy for Schools and Colleges* 53 (1868).

[5] *Black's Law Dictionary* added (at 773) that "it is said that th[e] restrictive signification [to natural persons] is not necessarily inherent in the word, and that it may, in proper cases, include artificial persons." Except for the omission of citations to three state-court cases from 1849, 1852, and 1880, that definition had not changed since 1910. See Henry Campbell Black, *A Law Dictionary* 618 (2d ed. 1910). The relevant question here, however, is not whether "individual" could be understood, in highly unusual cases, to include an artificial person, but whether that is the term's "ordinary meaning." *Gross*, 129 S. Ct. at 2350. It is not, as shown by the statutes and cases discussed below.

between an "individual" and an organizational entity of one kind or another. See, *e.g.*, 8 U.S.C. 1101(b)(3) (defining "person," in the Immigration and Nationality Act, as "an individual or an organization"); 11 U.S.C. 101(31)(A)-(C) (defining "insider" differently for purposes of the Bankruptcy Code, depending on whether the debtor is an "individual," "corporation," or "partnership"); 46 U.S.C. 12507(d) ("If a person, not an individual, is involved in a violation of this chapter, the president or chief executive of the person also is subject to any penalty[.]").[6]

Of particular significance, that distinction is manifest in the Dictionary Act, which generally defines "person" and "whoever" to "include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, *as well as* individuals." 1 U.S.C. 1 (emphasis added). Petitioners suggest (Br. 23) that the Dictionary Act indicates that "individual" encompasses organizations because some of the terms in the "definition of 'person' obviously overlap to a substantial degree." But pe-

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[6] See also, *e.g.*, 2 U.S.C. 622(8)(A)(ii) (defining "government-sponsored enterprise" as corporate entity that is "owned by private entities or individuals"); 7 U.S.C. 138 (defining "laboratory" as "any facility or vehicle that is owned by an individual or a public or private entity"); 12 U.S.C. 1832(a) (authorizing banks to establish certain accounts "held by one or more individuals or by an organization * * * which is not operated for profit"); 18 U.S.C. 1961(3) (defining "person" as "any individual or entity capable of holding a legal or beneficial interest in property"); 18 U.S.C. 2331(3) (same); 21 U.S.C. 1907(5) (defining "person" as "an individual or entity"); 30 U.S.C. 1403(14) (defining "United States citizen" to include "any individual who is a citizen of the United States" and "any corporation, partnership, joint venture, association, or other entity organized or existing under the laws of any of the United States"); 51 U.S.C. 50902(1) (Supp. IV 2010) (defining U.S. citizen as "an individual" or "an entity").

titioners fail to appreciate that the definition adds a group of potentially overlapping categories of artificial persons to a baseline of natural persons (*i.e.*, "individuals"), which, notably, is set off from the list of artificial persons by the phrase "as well as," indicating that it differs in kind.

c. This Court's opinions also regularly distinguish between "individuals" and organizations, without pausing to explain or justify the Court's evident understanding that an individual is a natural—and not an artificial—person. See, *e.g.*, *Goodyear Dunlop Tires Operations, S.A.* v. *Brown*, 131 S. Ct. 2846, 2853-2854 (2011) ("For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home."); *FCC* v. *AT&T Inc.*, 131 S. Ct. 1177, 1182 (2011) ("'Personal' ordinarily refers to individuals. We do not usually speak of personal characteristics, personal effects, personal correspondence, personal influence, or personal tragedy as referring to corporations or other artificial entities."); *Citizens United* v. *FEC*, 130 S. Ct. 876, 900 (2010) ("Corporations and other associations, like individuals, contribute to the discussion, debate, and the dissemination of information and ideas[.]") (citation omitted); *Braswell* v. *United States*, 487 U.S. 99, 104 (1988) ("[F]or purposes of the Fifth Amendment, corporations and other collective entities are treated differently from individuals.").

d. Petitioners invoke *Clinton* v. *City of New York*, 524 U.S. 417 (1998), as evidence that, despite the foregoing, the term "individual" may "encompass artificial entities." Pet. Br. 19. But that decision gives petitioners little support. *Clinton* held that the Line Item Veto

Act's provision for expedited judicial review at the behest of "[a]ny Member of Congress or any individual adversely affected," 2 U.S.C. 692(a)(1) (Supp. II 1996), applied to cases brought by "natural persons" or "corporate persons." 524 U.S. at 428-429. In doing so, the Court recognized that its interpretation was inconsistent with "ordinary usage" and with the usual "meaning in the law," and that it was compelled only because a narrower reading "would produce an absurd result." *Id.* at 428 n.13, 429 n.14. Cf. *id.* at 454 (Scalia, J., concurring in part and dissenting in part) ("With the exception of [one] natural person, the appellees—corporations, cooperatives, and governmental entities—are not 'individuals' under any accepted usage of that term.").

Petitioners do not—and could not plausibly—contend that it would be "absurd" to construe the TVPA as applying only to natural persons. Congress could reasonably have decided that, as discussed below, TVPA suits should be brought only against natural persons. Accordingly, *Clinton* cannot justify petitioners' departure from ordinary meaning.

e. The lower-court decisions that petitioners cite (Br. 19-20) for the rare instances in which federal statutes using "individual" have been construed as applying to non-natural persons are no more helpful to them. In *United States* v. *Middleton*, 231 F.3d 1207 (2000), the Ninth Circuit construed "individual" as including corporations to avoid an absurd result. *Id.* at 1211. *United States* v. *Perry*, 479 F.3d 885 (D.C. Cir. 2007), involved the same provision and followed *Middleton*, but it also allowed "individuals" to include "governmental agencies" (there, the EPA). *Id.* at 893 n.7, 894 n.10. *Perry* thus contravenes petitioners' principal contention: that

the TVPA used "individual" rather than "person" in order to "exclude sovereign entities." Pet. Br. 22.

Petitioners suggest that courts have "uniformly" construed a reference to "individual" in former 11 U.S.C. 362(h) (2000)—now found at 11 U.S.C. 362(k)(1)—as including not just natural persons but also corporate debtors. Pet. Br. 20 (quoting *In re Atlantic Bus. & Cmty. Corp.*, 901 F.2d 325, 329 (3d Cir. 1990)). In fact, however, all five circuits to have considered the question since 1990 have rejected that interpretation. See *In re Spookyworld, Inc.*, 346 F.3d 1, 7-8 & n.3 (1st Cir. 2003) (citing cases).

2. The TVPA's structure confirms that Congress did not intend to make organizations liable

Two aspects of the TVPA's structure demonstrate that, consistent with the Dictionary Act, Congress employed the ordinary meaning of "individual" in the TVPA and intended to create a statutory right of action against natural persons but not organizations.

a. First, as the court of appeals observed, "[t]he liability provision of the [TVPA] uses the word 'individual' five times in the same sentence—four times to refer to the victim of torture or extrajudicial killing, which could be only a natural person, and once to the perpetrator." Pet. App. 8a-9a. Of course, the "normal rule of statutory construction [is] that identical words used in different parts of the same act are intended to have the same meaning." *Commissioner* v. *Lundy*, 516 U.S. 235, 250 (1996) (citation omitted). And that presumption is "surely at its most vigorous when a term is repeated within a given sentence." *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994). Here, the TVPA indisputably uses the "human being" definition of "individual" in the four in-

stances where it refers to the victim, and there is no basis for concluding that the fifth instance reflects a switch to petitioners' obscure definitions referring to an "object," "thing," or "group."

In responding to the court of appeals' analysis on this point, petitioners cite provisions where "the same word" identifies both an offender and a victim. Pet. Br. 27-28 (discussing 8 U.S.C. 1101(b)(3) and 1324; 18 U.S.C. 229A and 229F; 33 U.S.C. 1319(c)(3)(A); and 42 U.S.C. 7413(c)). But the relevant word in every one of petitioners' examples is "person," which ordinarily includes both natural persons and organizations (1 U.S.C. 1) and is specifically defined in one of petitioners' examples as including "an individual or an organization" (8 U.S.C. 1101(b)(3)).

As petitioners note (Br. 27), the canon that identical words should be given the same meaning in different parts of a statute is not absolute. The Court departs from it when "there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent." *General Dynamics Land Sys., Inc.* v. *Cline*, 540 U.S. 581, 595 (2004) (citation omitted); see *Environmental Def.* v. *Duke Energy Corp.*, 549 U.S. 561, 573-576 (2007) (holding that EPA could reasonably regulate "modifications" differently under two pollution-control schemes in the Clean Air Act, given differing purposes of those two schemes). The five appearances of the word "individual" in one sentence of the TVPA, however, are not in "different parts" of the statute, and they do not reflect differences in intent or purpose.

b. A second attribute of the TVPA's liability provision provides strong confirmation that Congress in-

tended for "individual" to bear its ordinary meaning. In addressing the extrajudicial killing of "an individual," the statute provides for the perpetrators to be liable "to the individual's legal representative, or to any *person* who may be a claimant in an action for wrongful death." TVPA § 2(a)(2) (emphasis added). That disparate use of "individual" and "person" in adjacent clauses should be given effect, not disregarded. See *Russello* v. *United States*, 464 U.S. 16, 23 (1983).

The court of appeals concluded that the shift within that sentence from "individual" to "person" would allow for a wrongful-death claim brought by "a non-natural person, such as the decedent's estate." Pet. App. 9a. Petitioners contend (Br. 29) that the court of appeals erred, because "[t]he only legitimate claimants other than legal representatives of the deceased in wrongful death actions are natural persons—namely, relatives of the deceased." But petitioners themselves are mistaken.

As the Restatement comment that they cite acknowledges, "[d]eath statutes vary in form and purpose." Restatement (Second) of Torts § 493 cmt. a (1979). Contrary to petitioners' assertion, it is not always true that "an estate itself cannot be a claimant" (Br. 29) in a wrongful-death action. For example, the civil action authorized by 18 U.S.C. 2333(a) may be brought by the victim or by "his or her estate, survivors, or heirs." And the Mississippi Supreme Court has rejected the view that "a wrongful death action belongs solely to the heirs of the deceased," because Mississippi's wrongful-death statute permits suit by family members as well as by "the estate of the decedent, an insurance company exercising its right of subrogation, and any other parties claiming a right of recovery." *Cleveland* v. *Mann*, 942 So. 2d 108, 118 (2006) (en banc).

Moreover, routine processes of subrogation and assignment also allow non-natural persons to bring wrongful-death suits. This Court long ago held that, when an employer had paid compensation to a deceased worker's relative under what is now known as the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*, and the relative had not pursued a wrongful-death claim against a third-party tortfeasor, the Act assigned the relative's interest in that claim to the employer, who could therefore seek "the full recovery provided by the wrongful death act" and could do so by filing in the employer's own name (rather than the relative's). *Aetna Life Ins. Co.* v. *Moses*, 287 U.S. 530, 539-542 (1933). See 33 U.S.C. 933(b) (current assignment provision); *Rodriguez* v. *Compass Shipping Co.*, 451 U.S. 596, 603 (1981) (an "assignment * * * transfers the * * * entire right to commence a third-party action to the employer"). The details vary, but similar assignment or subrogation procedures are available under workers' compensation laws in many States. See Gary L. Wickert, *Workers' Compensation Subrogation in All 50 States* §§ 2.1-2.2, at 8-11 (4th ed. 2009). Thus, if an extrajudicial killing occurred in a U.S. harbor or in a place of employment subject to state or federal workers' compensation laws, an employer or insurer that paid death benefits to a decedent's relatives might be able to bring a wrongful-death claim as an assignee or subrogee. See also Resp. Br. 27.

Accordingly, "[t]here is strong reason to believe that Congress intended the differences that its language suggests," *Burlington N. & Santa Fe Ry.* v. *White*, 548 U.S. 53, 63 (2006), and its decision to permit an "individual" or "person" to bring suit only against "[a]n individual" should be respected. Petitioners' reading of Section

2(a), by contrast, is starkly inconsistent with ordinary principles of statutory construction. They read the statute's reference to "person" as including *only* natural persons, and one of its references to "individual" as including both natural and non-natural persons—exactly the opposite of the normal relationship between those two terms in legal usage. See *Clinton*, 524 U.S. at 428 n.13. Moreover, because four appearances of "individual" in Section 2(a) concededly apply *only* to natural persons, there would, in petitioners' view, be no reason for Congress to have used the term "person" in the one place it appears (rather than repeating "individual").

3. Congress does not use "individual" when it intends to subject organizations to liability

Other statutes further demonstrate that Congress does not use "individual" to establish organizational liability.

That is perhaps best reflected in a statute enacted in October 1992, just seven months after the TVPA became law. In amending criminal provisions first added by the Antiterrorism Act of 1990, the 102d Congress established a cause of action and jurisdiction for a civil remedy for "[a]ny national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs." Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 1003(a)(4), 106 Stat. 4522 (1992) (18 U.S.C. 2333(a)). The venue provision specified that "[a]ny civil action under section 2333" could be instituted "against any person," 18 U.S.C. 2334(a), and the statute specifically defined "person" as "any individual *or entity* capable of holding a legal or beneficial interest in property." 18 U.S.C. 2331(3) (emphasis added).

There is thus no doubt that the 102d Congress understood—in the specific context of deciding who could be a defendant in a civil tort action—that "individual" did not already include an "entity," but that it could still establish organizational liability by using a broader term.

The 102d Congress's amendments to the Antiterrorism Act also refute petitioners' contention that Congress uses the term "individual" when it wishes to exclude governments, but not other entities, from liability. Having provided that civil suits for terrorist acts could be brought against "any person" (including both "individual[s]" and "entit[ies]"), 18 U.S.C. 2331(3), 2333(a), 2334(a)-(b), Congress added a separate provision to specify further that such actions could not be maintained against "a foreign state, an agency of a foreign state, or an officer or employee of a foreign state or an agency thereof acting within his or her official capacity or under color of legal authority." 18 U.S.C. 2337(2).

Following that model—using a term broad enough to include entities but carving out governmental ones—would have been a far clearer, and more direct, way to achieve the result petitioners seek here. That Congress felt it necessary to use that mechanism a few months after it enacted the TVPA strongly indicates that it did not think that simply using the term *individual* would suffice to include nongovernmental organizations and simultaneously to exclude governmental ones.

By the same token, Congress's decision to employ materially different language to identify potential defendants under the TVPA and the Antiterrorism Act exposes a basic flaw in petitioners' claim (Br. 30-32) that those statutes should be construed *in pari materia*. The same thing is true of petitioners' other two "federal stat-

utes that provide civil remedies to American citizens who suffer torture or extrajudicial killing." Pet. Br. 30. Unlike the TVPA, they use terms that ordinarily denote organizations. See 28 U.S.C. 1603(a), 1605A(c) (2006 & Supp. II 2008) (terrorism exception to the Foreign Sovereign Immunities Act, applying to a "foreign state," which includes an "agency or instrumentality"); 42 U.S.C. 1983 (applying to "[e]very person" who subjects another to a violation of federal rights). So do all of the other "federal statutes that create tort actions" that petitioners identify. Br. 14.[7]

There is accordingly no reason to conclude that the TVPA reflects anything other than the ordinary meaning of "individual," which is limited to natural persons.

B. The Legislative History Shows That Congress Did Not Intend To Establish Liability For Non-Natural Persons

"[R]eliance on legislative history is unnecessary in light of the statute's unambiguous language." *Milavetz, Gallop & Milavetz, P.A.* v. *United States*, 130 S. Ct. 1324, 1332 n.3 (2010). Nevertheless, the evolution of the statutory text that became the TVPA shows that its drafters deliberately changed "person" to "individual," and that they did so to avoid establishing liability for non-natural persons. The legislative history does not support petitioners' attempt to characterize that change as merely drawing a distinction between governmental and nongovernmental organizations.

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[7] See 15 U.S.C. 1692e, 1692k ("debt collector"); 15 U.S.C. 1692a(6) (defining "debt collector" as "any person" who does certain things); 42 U.S.C 1985 ("person"); 46 U.S.C. 30302 ("person or vessel"); 46 U.S.C. 30104 (Jones Act) ("employer"); *Cosmopolitan Shipping Co.* v. *McAllister*, 337 U.S. 783, 791 (1949) (interpreting "employer" under the Jones Act as "one person, firm, or corporation").

1. The TVPA's drafters deliberately changed "person" to "individual" to limit liability to human beings

a. As explained above (pp. 3-4, *supra*), when the TVPA was introduced in the 100th Congress, it would have established that "[e]very person" who, under color of foreign law, subjects "any person" to torture or extrajudicial killing would be liable to "the party injured or that party's legal representative." *House Hearing* 82. During the markup session of the House Foreign Affairs Committee, however, Representative Leach, one of the bill's three original sponsors (*id.* at 1, 81), proposed that the text be amended to provide "a precise definition of person to make it clear we are applying it to individuals and not to corporations." *Id.* at 87. After a colloquy with the Committee's legislative counsel—who explained that the amendment would be "fairly simple" and could be accomplished by "changing the word[] 'person' to 'individual[]' in several places in the bill"—the proposed amendment was unanimously adopted. *Id.* at 87-88. The version of the bill reported out of the Foreign Affairs Committee (and later out of the House Judiciary Committee) reflected the substitution of "individual" for "person" in the liability provision. *Id.* at 88 n.1, 111; H.R. Rep. No. 693, 100th Cong., 2d Sess. Pt. 1, at 1 (1988). That bill passed the House during the 100th Congress, as did a materially identical version in the 101st Congress, and the materially identical version enacted by the 102d Congress. See H.R. Rep. No. 367, 102d Cong., 1st Sess. Pt. 1, at 6 (1991) (*1991 House Report*).

b. Petitioners dismiss the markup session's real-time account of how the operative text of the TVPA came to be, because, they say, only committee reports reflect the understanding of those "involved in drafting

and studying proposed legislation." Br. 44 (quoting *Eldred* v. *Ashcroft*, 537 U.S. 186, 209 n.16 (2003)). But that rationale is inapplicable here. Unlike a floor statement from a single member during a debate, the markup session plainly does reflect the understanding of the TVPA's drafters, because the amendment came at the request of one of the bill's three original sponsors, and it unanimously passed the committee in the presence of another one of the original sponsors (Rep. Yatron). *House Hearing* 1, 88.

c. In any event, the statements from committee reports on which petitioners principally rely (Br. 43) are consistent with the drafters' evident desire during the markup session to avoid imposing liability on nonnatural persons. The Senate Judiciary Committee's report stated that "[t]he legislation uses the term 'individual' to make crystal clear that foreign states or their entities cannot be sued under this bill under any circumstances: only individuals may be sued." S. Rep. No. 249, 102d Cong., 1st Sess. 7 (1991) (*Senate Report*). That statement—which assumes that the term "individual" would reasonably *exclude* foreign-state "entities" but contains no affirmative indication that it would somehow *include* nongovernmental entities—is entirely consistent with the House drafters' explanation that corporations would not be covered.[8]

The legislative history therefore gives no reason to doubt that, if Congress had intended to reach nongov-

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[8] Petitioners contend that the House report "makes the same point," Br. 43, but that report points out that "[o]nly 'individuals,' not foreign states, can be sued under the bill." *1991 House Report* 4. Unlike the Senate report, that statement does not even suggest that excluding foreign states was one reason for, as opposed to simply a logical consequence of, the statute's reference to "individual."

ernmental organizations with the TVPA's liability provision, it would have used a term broader than "individual," as it did in the Antiterrorism Act (see pp. 19-20, *supra*).[9]

2. The legislative history does not affirmatively indicate that organizations would be liable

Petitioners contend that other parts of the legislative history "[e]xpressly [a]ssume[]" that "non-sovereign organizations would be subject to the TVPA." Br. 46. But the statements they cite are inapposite.

a. Petitioners first contend that Congress necessarily "understood the Act to apply to organizations such as the PLO," Br. 47-48, because the TVPA responded to *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774 (1984), cert. denied, 470 U.S. 1003 (1985), in which the D.C. Circuit held that an ATS suit could not proceed against, *inter alia*, the PLO (see p. 2, *supra*). But it is too simplistic to claim that "the TVPA was intended to facilitate suits similar to" *Tel-Oren*. Pet. Br. 46. The committee reports indicate that Congress did indeed want to provide the "explicit grant of a cause of action" that Judge Bork had found wanting under the ATS. *1991 House Report* 4; see *Senate Report* 4-5. Providing that right of action, however, would have been equally necessary for suits against natural persons. See *Tel-Oren*, 726 F.2d at 804-805 (Bork, J., concurring). Moreover, because the

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[9] At one point in discussing the TVPA's color-of-law requirement, the Senate report notes that "this legislation does not cover purely private criminal acts by individuals *or nongovernmental organizations*." *Senate Report* 8 (emphasis added). But the addition of "nongovernmental organizations" to "individuals" indicates that the Judiciary Committee did not share petitioners' assumption that the term "individual" includes nongovernmental organizations.

TVPA reaches only conduct "under actual or apparent authority, or color of law, of any foreign nation," TVPA § 2(a), Congress did not reverse Judge Edwards's opinion in *Tel-Oren* by establishing liability for entities that were not recognized as state actors. See 726 F.3d at 791 (finding that the PLO had not engaged in "official or state-initiated torture").

b. Petitioners contend that their counter-textual reading of Congress's response to *Tel-Oren* is "confirm[ed]" by statements from "Senator Specter and others." Br. 48 & n.13. But the statements they cite were made during the Senate hearing, where two bills were under consideration: H.R. 1662, which used "individual," and S. 1629, which used "person." *The Torture Victim Protection Act of 1989: Hearing Before the Subcomm. on Immigration and Refugee Affairs of the S. Comm. on the Judiciary*, 101st Cong., 2d Sess. 2, 5 (1990) (*Senate Hearing*). To the extent Senator Specter "suggested" (Pet. Br. 48 n.13) that the TVPA would provide relief against the *Tel-Oren* defendants, he was presumably talking about the Senate bill, which he had introduced (*Senate Hearing* 2) but which was never enacted. And the testimony of Father Robert Drinan that petitioners quote (Br. 48 n.13) specified that someone had told him that "if *Senate bill 1629, this bill*, had been the law, the result in *Tel-Oren* would have been different." *Senate Hearing* 66 (emphasis added).

Notably, Father Drinan did not directly endorse that position on the merits, and it would be surprising if he had. When he testified in the House of Representatives on behalf of the American Bar Association, he was asked whether the TVPA should, in addition to addressing torture undertaken under color of governmental authority, have "another definition for including organizations like

the PLO." *House Hearing* 74. In response, he said: "I think that we should exclude non-governmental organizations. * * * I think it would be best to stay with that and just avoid all of the problems about the PLO and related groups." *Ibid.*; see also *ibid.* (similar sentiments expressed by Michael H. Posner, testifying for the Lawyers Committee for Human Rights). Father Drinan was not discussing the distinction between "person" and "individual," because the House bill had not yet been amended in that way, but his response did not assume that the TVPA would overrule *Tel-Oren* so sweepingly that the PLO would be liable.

c. For similar reasons, petitioners err in relying (Br. 49) on the following statement by a State Department Assistant Legal Adviser: "We understand that under *either version of the Act*, the prospective defendant must be found in the United States or otherwise submit himself (or *itself*) to U.S. jurisdiction." *Senate Hearing* 28-29 (emphases added). Petitioners contend that "the parenthetical using the word 'itself' can refer only to an organizational defendant." Br. 49. But the parenthetical is best understood as accommodating the variation between the Senate and House versions of the bill, without indicating any expectation that organizational defendants would be encompassed by "individual."

Nevertheless, if petitioners are willing to parse pronouns for such inferences, their position is refuted by other statements. After the Senate bill he sponsored had been amended to use "individual" rather than "person," Senator Specter explained that "[i]f a torturer does not come to the United States and establish sufficient contacts, then *he or she* cannot be sued under this act." 138 Cong. Rec. 4176 (1992) (emphasis added); see also 135 Cong. Rec. 22,715 (1989) (statement of Rep.

Morrison) (explaining TVPA would apply "only when the perpetrator seeks the protection of our shores or otherwise subjects *himself* to the personal jurisdiction of a U.S. court") (emphasis added).

d. The legislative history thus confirms what is evident from the TVPA's text and structure. At the very least, it does not unambiguously support petitioners' position. That alone should be fatal to their argument, as the Court does not "allow[] ambiguous legislative history to muddy clear statutory language." *Milner* v. *Department of the Navy*, 131 S. Ct. 1259, 1266 (2011).

C. Policy Concerns Do Not Override The Statutory Text

Despite the TVPA's plain language and internal structure, the contemporaneous indications that Congress does not use "individual" to create organizational liability, and the legislative history's showing that the TVPA's drafters deliberately chose the term "individual" to avoid imposing liability on non-natural persons, petitioners nevertheless suggest (Br. 24) that the term "individual" is ambiguous in light of background principles they infer from general policy objectives and, more specifically, from the ATS. This Court should reject petitioners' "attempt to create ambiguity where the statute's text and structure suggest none." *Ali* v. *Federal Bureau of Prisons*, 552 U.S. 214, 227 (2008). In any event, the policy objectives and statutes that petitioners invoke do not call into doubt the conclusion that the TVPA reaches only natural persons.

1. Petitioners contend that the Court should derive organizational liability under the TVPA from the "background of ordinary tort-related . . . liability rules." Br. 12 (quoting *Meyer* v. *Holley*, 537 U.S. 280, 285 (2003)); see also Pet. Br. 16-17, 26. Background tort

principles, however, become relevant when Congress creates a statutory tort and fails to address some aspect of the suit. See *Meyer*, 537 U.S. at 286 ("Congress' silence * * * permit[s] an inference that Congress intended to apply ordinary background tort principles.") (emphasis omitted). Here, Congress was not silent about who could be held liable. It expressly limited liability to "[a]n individual," TVPA § 2(a), when the ordinary meaning of that word denotes natural persons, and against a statutory background in which it uses "person," or another term including organizational entities, to establish liability for non-natural persons. See pp. 8-21, *supra*.

2. Petitioners also contend that the TVPA itself invokes "traditional agency principles, including organizational liability," because it makes liable any individual who "'subjects'" a victim to torture or extrajudicial killing. Br. 25 (quoting TVPA § 2(a)). It is true that *an individual* may, in appropriate circumstances, be liable under the TVPA for subjecting another to such acts, even if he does not personally deliver the blows. Yet it does not follow that Congress established liability for *any* principal—including an organization—on whose behalf a torturer acts, because the statute permits only "[a]n individual" to "be liable" (TVPA § 2(a)(1) and (2)). An officer who gives an order to kill or torture is an "individual," but an organization is not.

For similar reasons, petitioners' insistence (Br. 39, 41, 49) that the activities of "death squads" are within the TVPA's contemplation is beside the point. The TVPA addressed death squads by creating a right of action against their individual members. And, even in the Eleventh Circuit (the only circuit that permits TVPA suits against non-natural persons), cases about death-

squad activities have been brought against individuals, not organizations. See *Cabello* v. *Fernández-Larios*, 402 F.3d 1148, 1152-1153 & n.1 (11th Cir. 2005) (suit against former Chilean military officer for role in murder committed by "Caravan of Death"); see also *Chavez* v. *Carranza*, 413 F. Supp. 2d 891, 900 (W.D. Tenn. 2005) (suit, in relevant part, against El Salvador's former Subsecretary of Defense and Public Security, for murders committed by death squads); *Doe* v. *Rafael Saravia*, 348 F. Supp. 2d 1112 (E.D. Cal. 2004) (suit against former Salvadoran military officer who was chief of security for death squads).[10]

3. Petitioners further contend (Br. 34-37) that "individual" should be construed in light of international agreements prohibiting torture and extrajudicial killing. The TVPA, however, did not define "individual" in a manner "virtually identical," *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 437 (1987), to any term or definition in those agreements (which do not distinguish, in their definitions, between natural and juridical actors, see U.S. Amicus Br. at 20-21, *Kiobel* v. *Royal Dutch Petroleum Co.*, No. 10-1491 (filed Dec. 21, 2011) (U.S. *Kiobel* Br.)). The agreements therefore furnish little guidance about what the term means in the TVPA.

Moreover, petitioners appropriately refrain from arguing that applying the ordinary meaning of "individual" in the TVPA would put the United States in viola-

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[10] Other suits against Salvadoran officers have involved allegations about the acts of military or police personnel in units often associated with death squads, without necessarily specifying death squads' direct involvement. See, *e.g.*, *Chavez* v. *Carranza*, 559 F.3d 486 (6th Cir.), cert. denied, 130 S. Ct. 110 (2009); *Arce* v. *Garcia*, 434 F.3d 1254, 1256 (11th Cir. 2006).

tion of those agreements. See Pet. Br. 34.[11] There is, accordingly, no occasion to apply the canon that Acts of Congress should be construed to avoid conflict with international law. See *Murray* v. *Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804).

4. Finally, petitioners contend (Br. 33-34, 50), that the TVPA should be construed to apply to organizations because Congress enacted it in part to supplement and expand upon aliens' statutory right of action under the ATS, under which (they contend) organizations can be held liable. Pet. Br. 33-34, 50. The United States agrees that corporations can be held liable in a suit based on the ATS. See U.S. *Kiobel* Br. at 12-31. But critical differences between the two statutes prevent the answer from being the same with respect to the TVPA.

While the ATS expressly limits the class of potential ATS plaintiffs to "alien[s]," 28 U.S.C. 1350, it "does not distinguish among classes of defendants." *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 438 (1989). It is silent about what defendants may be sued, and "at the time of [its] enactment * * * enabled federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law." *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 712 (2004). It is therefore appropriate to apply back-

[11] Also, although Article 14 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. 19 (1988), 1465 U.N.T.S. 85, requires States Parties to provide civil remedies for victims of torture, when the Senate gave its advice and consent to the CAT, it was subject to an "understanding" that Article 14 applies only to "acts of torture committed in territory under the jurisdiction of that State Party." 136 Cong. Rec. 36,198 (1990). The TVPA applies to torture under color of foreign law, which would typically occur outside the United States' jurisdiction.

ground principles of tort liability in defining the class of defendants where a federal-common-law cause of action may otherwise be created on the basis of the ATS. See U.S. *Kiobel* Br. 22-27. The TVPA, by contrast, specifies that only "[a]n individual" will "be liable for damages." TVPA § 2(a). Accordingly, courts are not free to apply background principles of tort liability to extend the TVPA's coverage to defendants that are not "individuals."

Petitioners contend (Br. 50) that Congress could not have intended to permit aliens to bring suits against corporations where a federal-common-law cause of action is created under the ATS and deny similar latitude to U.S. citizens under the TVPA. While the TVPA was intended to "supplement[]" the ATS (*Sosa*, 542 U.S. at 731), the two statutes differ in several ways, and substantive and procedural disparities between actions brought by U.S. citizens and by aliens can arise wherever the two statutes diverge. For instance, an alien may bring a suit under the ATS arising from an act of piracy, but a U.S. citizen may bring no such suit under either the ATS or the TVPA, because the former does not permit suits by U.S. citizens, and the latter does not encompass piracy. The TVPA also imposes two express procedural limitations that the text of the ATS itself does not: a ten-year statute of limitations and a requirement that the plaintiff exhaust remedies before filing suit. TVPA § 2(b) and (c). And Congress did not intend that the TVPA's establishment of a right of action for torture or extrajudicial killing would resolve whether or in what circumstances violations of other substantive

norms might be actionable under the ATS. See *Senate Report* 5; *1991 House Report* 3.[12]

This Court should not upset the policy balance reflected in Congress's decision to enact what the TVPA's proponents acknowledged was a "narrowly crafted bill which is designed to deal with one aspect of the problem," *House Hearing* 74 (testimony of Michael H. Posner); see also Resp. Br. 41 n.16 (quoting Senators' floor statements). Cf. *Bowen* v. *Owens*, 476 U.S. 340, 347 (1986) ("This Court consistently has recognized that in addressing complex problems a legislature may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind.") (internal quotation marks omitted).

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[12] Some aspects of the relationship between the ATS and the TVPA remain unsettled. The lower courts have divided over whether the TVPA displaces any federal-common-law cause of action for torture or extrajudicial killing that might otherwise be created under the ATS. Compare, *e.g.*, *Enahoro* v. *Abubakar*, 408 F.3d 877, 884-886 (7th Cir. 2005) (holding that TVPA has "occup[ied] the field" for law-of-nations claims involving torture or extrajudicial killings), cert. denied, 546 U.S. 1175 (2006), with *Aldana* v. *Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1250-1251 (11th Cir. 2005) ("Plaintiffs can raise separate claims for state-sponsored torture under the [ATS] and also under the [TVPA]."), cert. denied, 549 U.S. 1032 (2006). That issue is beyond the scope of the question presented in this case, and respondents agree (Br. 47) that it need not be addressed here. It was squarely presented in the conditional cross-petition in *Kiobel*, but the Court denied certiorari. See Pet. at i, *Shell Petroleum N.V.* v. *Kiobel*, 132 S. Ct. 248 (2011) (No. 11-63).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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FEBRUARY 2012

APPENDIX

1. The Torture Victim Protection Act of 1991, 28 U.S.C. 1350 note, provides:

"SECTION 1. SHORT TITLE.

"This Act may be cited as the 'Torture Victim Protection Act of 1991'.

"SEC. 2. ESTABLISHMENT OF CIVIL ACTION.

"(a) LIABILITY.—An individual who, under actual or apparent authority, or color of law, of any foreign nation—

"(1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or

"(2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

"(b) EXHAUSTION OF REMEDIES.—A court shall decline to hear a claim under this section if the claimant has not exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred.

"(c) STATUTE OF LIMITATIONS.—No action shall be maintained under this section unless it is commenced within 10 years after the cause of action arose.

"SEC. 3. DEFINITIONS.

"(a) EXTRAJUDICIAL KILLING.—For the purposes of this Act, the term 'extrajudicial killing' means a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the

judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.

"(b) TORTURE.—For the purposes of this Act—

"(1) the term 'torture' means any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering (other than pain or suffering arising only from or inherent in, or incidental to, lawful sanctions), whether physical or mental, is intentionally inflicted on that individual for such purposes as obtaining from that individual or a third person information or a confession, punishing that individual for an act that individual or a third person has committed or is suspected of having committed, intimidating or coercing that individual or a third person, or for any reason based on discrimination of any kind; and

"(2) mental pain or suffering refers to prolonged mental harm caused by or resulting from—

"(A) the intentional infliction or threatened infliction of severe physical pain or suffering;

"(B) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;

"(C) the threat of imminent death; or

"(D) the threat that another individual will imminently be subjected to death, severe physical

pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality."

2. 1 U.S.C. 1, provides in pertinent part:

Words denoting number , gender, and so forth

In determining the meaning of any Act of Congress, unless the context indicates otherwise—

* * * * *

the words "person" and "whoever" include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals;

* * * * *

3. 18 U.S.C. 2331 provides in pertinent part:

Definitions

As used in this chapter—

* * * * *

(3) the term "person" means any individual or entity capable of holding a legal or beneficial interest in property;

* * * * *

4. 18 U.S.C. 2333 provides in pertinent part:

Civil remedies

(a) ACTION AND JURISDICTION.—Any national of the United States injured in his or her person, property, or business by reason of an act of international terrorism, or his or her estate, survivors, or heirs, may sue therefor in any appropriate district court of the United States and shall recover threefold the damages he or she sustains and the cost of the suit, including attorney's fees.

* * * * *

5. 18 U.S.C. 2334 provides in pertinent part:

Jurisdiction and venue

(a) GENERAL VENUE.—Any civil action under section 2333 of this title against any person may be instituted in the district court of the United States for any district where any plaintiff resides or where any defendant resides or is served, or has an agent. Process in such a civil action may be served in any district where the defendant resides, is found, or has an agent.

(b) SPECIAL MARITIME OR TERRITORIAL JURISDICTION.—If the actions giving rise to the claim occurred within the special maritime and territorial jurisdiction of the United States, as defined in section 7 of this title, then any civil action under section 2333 of this title against any person may be instituted in the district court of the United States for any district in which any plaintiff resides or the defendant resides, is served, or has an agent.

* * * * *

6. 18 U.S.C. 2337 provides:

Suits against Government officials

No action shall be maintained under section 2333 of this title against—

(1) the United States, an agency of the United States, or an officer or employee of the United States or any agency thereof acting within his or her official capacity or under color of legal authority; or

(2) a foreign state, an agency of a foreign state, or an officer or employee of a foreign state or an agency thereof acting within his or her official capacity or under color of legal authority.

AMICUS CURIAE BRIEF

No. 11-88

IN THE

Supreme Court of the United States

ASID MOHAMAD *et al.*,
Petitioners,

v.

PALESTINIAN AUTHORITY AND PALESTINE LIBERATION ORGANIZATION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE AMERICAN PETROLEUM INSTITUTE, THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE NATIONAL FOREIGN TRADE COUNCIL, THE ORGANIZATION FOR INTERNATIONAL INVESTMENT, THE UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS AND USA*ENGAGE AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

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QUESTION PRESENTED

Whether the Torture Victim Protection Act, 28 U.S.C. §1350 note, permits actions against defendants that are not natural persons.

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IN THE

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PALESTINIAN AUTHORITY AND PALESTINE LIBERATION ORGANIZATION,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF THE AMERICAN PETROLEUM INSTITUTE, THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE NATIONAL FOREIGN TRADE COUNCIL, THE ORGANIZATION FOR INTERNATIONAL INVESTMENT, THE UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS AND USA*ENGAGE AS *AMICI CURIAE* IN SUPPORT OF NEITHER PARTY

INTEREST OF *AMICI CURIAE* [1]

Amici curiae are associations, some of whose member corporations have been named as defendants in

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[1] No counsel for any party authored this brief in whole or in part, and no person other than *amici*, their members, or their counsel have made any monetary contribution intended to fund the preparation or submission of this brief. All parties have filed general letters with the Clerk's office consenting to *amicus* briefs.

cases involving the Torture Victim Protection Act ("TVPA"):

- The American Petroleum Institute ("API") is a national, non-profit trade association headquartered in Washington, D.C., which represents over 490 members engaged in all aspects of the petroleum and natural gas industry, including exploration, production, refining, marketing, transportation and distribution of petroleum products. API regularly represents its members' interests in matters before this Court.
- The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation, representing more than 300,000 direct members and an underlying membership of more than three million businesses and trade and professional organizations of every size, sector and geographic region. An important function of the Chamber is to represent its members' interests in matters before Congress, the Executive Branch and the courts, including this Court.
- The National Foreign Trade Council ("NFTC") is the premier business organization advocating a rules-based world economy. Founded in 1914 by a group of American companies, NFTC and its affiliates now serve more than 250 member companies.
- The Organization for International Investment ("OFII") is the largest business association in the United States representing the interests of United States subsidiaries of multinational companies before all branches of government.

OFII's member companies operate throughout the United States, employing hundreds of thousands of workers in thousands of plants and locations throughout the country, as well as in many foreign countries, and are affiliates of companies transacting business throughout the world.

- The United States Council for International Business ("USCIB") is a business advocacy and policy development group representing 300 global companies, law firms, and business associations. USCIB advances the global interests of American business both at home and abroad. It is the U.S. affiliate of the International Chamber of Commerce, the Business and Industry Advisory Committee to the OECD, and the International Organization of Employers.

- USA*Engage is a broad-based coalition representing organizations, companies and individuals from all regions, sectors and segments of our society concerned about the proliferation of unilateral foreign policy sanctions at the federal, state and local level.

Amici unequivocally condemn torture and extrajudicial killing in all forms.

Despite the abhorrence of these practices, the question before the Court is not a general one about their unacceptability but, rather, a very specific question of statutory construction. The TVPA authorizes a cause of action against "[a]n individual who, under actual or apparent authority, or color of law, of any foreign nation" subjects another "individual" to an act of

torture or extrajudicial killing. 28 U.S.C. §1350 (statutory note).

In several cases, TVPA plaintiffs have argued that this phrase – individual ... under actual or apparent authority, or color of law, of any foreign nation – encompasses private companies (for ease of reference, *amici* hereinafter refer to this theory as "the corporate liability theory"). Typically in these cases, foreign government officials such as security forces are alleged to have engaged directly in the prohibited conduct, and TVPA plaintiffs then attempt to impute that conduct to a private company. Although the case before this Court does not present such a fact pattern, the question on which this Court granted review is phrased broadly enough to implicate the corporate liability theory. *Amici* file this brief to address the possible intersection between the question presented and the corporate liability theory.

Virtually all federal appellate courts have rejected the corporate liability theory. *See, e.g., Aziz v. Alcolac, Inc.* 658 F.3d 388 (4th Cir. 2011); *Bowoto v. Chevron Corp.*, 621 F.3d 1116 (9th Cir. 2010). *See also Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 323-24 (2d Cir. 2007) (Korman, J., concurring in part and dissenting in part). On the basis of this holding, these courts have rejected TVPA claims against private companies. One federal court of appeals, the Eleventh Circuit, has reached a contrary conclusion. *See, e.g., Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1264 n.13 (11th Cir. 2009). *Amici*'s sole interest in this case is to urge this Court to approve the specific rule announced in decisions like *Aziz* and *Bowoto* and to reject the view exemplified by the Eleventh Circuit's precedent.

That quite narrow interest differs from the interests of either party in this case. *Amici* do not ascribe to Petitioners' proposed interpretation of the TVPA. Petitioners urge this Court to adopt a view akin to that taken by the District Court in *Sinaltrainal v. Coca-Cola Co.*, 256 F.Supp.2d 1345, 1358-59 (S.D. Fla. 2003), *aff'd in part, vacated in part and remanded*, 578 F.3d 1252 (11th Cir. 2009). *See* Pet. 10, 13. The District Court in *Sinaltrainal* embraced the corporate liability theory. *Amici*, several of whom also appeared in *Sinaltrainal* on appeal, believe that the District Court in that case was incorrect.

Amici's interests also are not aligned with those of Respondents. Courts and Congress have found that the Palestine Liberation Organization ("PLO") engaged in brutal acts of terrorism and torture. *See Ungar v. Palestine Liberation Organization*, 402 F.3d 274 (1st Cir. 2005) (affirming $116 million default judgment against PLO and Palestinian Authority for murder of American citizen living in Israel); Pub. L. 100-204, Title X, § 1002(a)(4), Dec. 22, 1987, 101 Stat. 1331, 1406-07 (Congressional findings that "the PLO and its constituents groups have taken credit for, and been implicated in, the murders of dozens of American citizens abroad"). *Amici* unequivocally condemn that conduct.

Furthermore, resolution of this case may be intertwined with Respondents' juridical status. The Palestinian Authority ("PA") is an administrative entity formed pursuant to the 1994 Oslo Accords and assumes certain responsibilities for the West Bank of the Jordan River and the Gaza Strip located along the Mediterranean Coast. *See Ungar*, 402 F.3d at 286-87 (discussing the Oslo Accords and the PA's

creation). While the PLO's juridical status is less clear, both it and the PA have repeatedly argued in other litigation that they constitute "foreign states" for various purposes, including immunity under the Foreign Sovereign Immunities Act, 28 U.S.C. §1603 *et seq.*, and the viability of various federal causes of action. *See, e.g., Gilmore v. The Palestinian Interim Self-Government Authority*, 422 F. Supp. 2d 96 (D.D.C. 2006); *Knox v. Palestine Liberation Organization*, 306 F. Supp. 2d 424 (S.D.N.Y. 2004).[2]

Before the D.C. Circuit, both Respondents pressed this argument as an alternative ground for affirmance of the district court opinion dismissing Petitioners' TVPA claims. *See* Brief of Appellees in *Mohamad v. Rajoub*, No. 09-7109 *et al.* (May 19, 2010) at 44. They relied on legislative history surrounding the TVPA's enactment to assert that the law was not intended to encompass causes of action against foreign states. *See* S. Rep. No. 102-249 at 7 (1991). While *amici*, as representatives of private companies, have no interest in Respondents' juridical status, they strenuously object to Respondents' characterization of the TVPA's legislative history insofar as Respondents are suggesting the term "individual" excludes foreign states but not private companies.

For these reasons, *amici* submit this brief in support of neither party.

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[2] Those arguments are complicated by the fact that, since the TVPA's enactment, Congress has authorized federal jurisdiction over and a cause of action against certain state sponsors of terrorism. See 28 U.S.C. §1605A; *Republic of Iraq v. Beaty*, 556 U.S. 848 (2009) (discussing torture and terrorism exception).

SUMMARY OF ARGUMENT

The Torture Victim Protection Act does not extend liability to private companies. This conclusion flows from the plain language of the statute which limits the category of defendants to an "individual" acting "under actual or apparent authority, or color of law, of any foreign nation." Dictionary definitions of "individual," the Dictionary Act and this Court's precedents all support the conclusion that private companies fall outside the plain meaning of this term in the TVPA.

Moreover, all relevant tools of statutory interpretation point in the same direction. The legislative history surrounding the TVPA's passage illustrates with exceptional clarity that Congress amended early versions of the bill in order to ensure that corporations could not be liable. The statutory structure supports this view. The TVPA uses the term "individual" in other contexts, such as the description of the victim, where the term could not possibly be understood to mean private companies. Under well accepted canons of statutory construction, the term should be defined in a consistent manner across the statute. Finally, construing the statute not to cover private companies comports with its underlying purpose. That purpose was a narrow one – to give plaintiffs, including American citizens, a carefully crafted cause of action against individuals for certain acts of torture or extrajudicial killing.

Nor may private companies be liable under general principles of imputation. Such theories are incompatible with the TVPA's text, which limits the class of eligible defendants to individuals acting under a foreign nation's authority or color of law. Such theories also cannot be squared with other provisions

of the TVPA which limit liability to those who "subject" another individual to torture or extra-judicial killing. Other statutes embrace imputation principles explicitly, and Congress's failure to employ those statutory models in the TVPA counsels against their judicial adoption.

ARGUMENT

I. PRIVATE COMPANIES ARE NOT PROPER DEFENDANTS UNDER THE TORTURE VICTIM PROTECTION ACT.

This case concerns a straightforward matter of statutory interpretation – the meaning of the term "individual" in the Torture Victim Protection Act ("TVPA"), 28 U.S.C. §1350 (statutory note). Whatever its precise boundaries, this term as used in this statutory provision does not include private companies. That conclusion, accepted by virtually all federal appellate courts directly addressing the issue, flows from the TVPA's plain language, its legislative history, its statutory structure, and its animating purposes.

A. The plain meaning of the term "individual" in the TVPA does not encompass the corporate liability theory.

When approaching a question of statutory interpretation, this Court always begins with the plain meaning of the term at issue. *FCC v. AT&T, Inc.*, 131 S. Ct. 1177, 1182 (2011); *Johnson v. United States*, 130 S. Ct. 1265, 1267 (2010); *Leocal v. Ashcroft*, 543 U.S. 1, 8 (2004). To discern that meaning, it routinely consults dictionary definitions in use at the time of the statute's enactment. *See, e.g.*,

AT&T, 131 S. Ct. at 1182. Such dictionaries consistently define the term "individual" to mean "a single human being" and, in some cases, expressly differentiate it from a corporation or partnership. Random House Dictionary of the English Language 974 (2d ed. 1987); Webster's Third New International Dictionary 1152, 1686 (1986); Webster's New Collegiate Dictionary 581 (8th ed. 1979); Black's Law Dictionary 773 (6th ed. 1990). These definitions do not encompass private companies.

The Dictionary Act, 1 U.S.C. §1, buttresses this interpretation of the term "individual." While the Dictionary Act does not define the term "individual," it does define the term "person." Absent contrary contextual indications, "person" presumptively includes "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, *as well as individuals*." (emphasis added). The inclusion of the term "individual" alongside several types of private business entities strongly hints that these business forms do not fall within the meaning of the term "individual." *Bailey v. United States*, 516 U.S. 137, 146 (1995) (statutory terms should be defined so as to give each term independent meaning).

Other provisions of federal law re-enforce the Dictionary Act's traditional distinction between the terms "individual" and "person." Congress routinely differentiates between corporations and individuals. *See, e.g.*, 11 U.S.C. § 101(9)(a)(i) (defining corporation to include an "association having a power or privilege that a private corporation, but not an individual or partnership, possesses"). Likewise, Congress routinely uses the term "person" when it wishes to employ a term capturing both individuals and private business entities. *See, e.g.*, 8 U.S.C. §1185(c) (defining "person"

as an "individual, partnership, association, company or other incorporated body of individuals, or corporation, or body politic"); 15 U.S.C. §69(a) (similar); 21 U.S.C. §149(a) (similar); 22 U.S.C. §1978(h)(1) (similar). Indeed, the Federal Rules of Civil Procedure, promulgated by this Court, use "individual" to denote a natural person in contrast to a private business entity like a corporation. *See* Fed. R. Civ. P. 4(e), 4(h).

This Court's precedents support this customary differentiation between the plain meaning of "person" (interpreted broadly to include private companies) and the plain meaning of "individual" (interpreted narrowly not to include such entities). *See Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 125-34 (2003); *Monell v. Dep't. of Social Services*, 436 U.S. 658 (1978). For example, in *Clinton v. City of New York*, this Court, citing the Dictionary Act, stressed the traditional distinction between the two terms when used in the law:

> Although in ordinary usage both "individual" and "person" often refer to an individual human being, *see, e.g.*, Webster's Third New International Dictionary 1152, 1686 (1986) ("individual" defined as a "single human being"; "person" defined as "an individual human being"), "person" often has a broader meaning in the law, *see, e.g.*, 1 U.S.C. § 1 ("person" includes "corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals").

524 U.S. 417, 428 n. 13 (1998). Consistent with this view, this Court later held in *Chandler* that municipal corporations constituted "persons" amenable to *qui tam* suits under the False Claims Act and, in

support of that holding, canvassed the long history in which the term "person" had been understood to encompass corporations. 538 U.S. at 125-27.

Of course, absent explicit definition by Congress, such interpretive understandings are not absolute. Accordingly, this Court has occasionally departed from this traditional understanding to avoid an absurd result or where, as the Dictionary Act instructs, context clearly indicates otherwise. For example, this Court has held that terms such as "person" or "personal" did not encompass corporations when that interpretation did not accord with the context in which the term appeared. *AT&T*, 131 S. Ct. at 1182; *Rowland v. California Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194, 201-06 (1993). Likewise, this Court in *Clinton* held that the term "individual" encompassed corporate entities in order to avoid an absurd result. *Clinton*, 524 U.S. at 428.

Some courts interpreting the TVPA have relied on this Court's decision in *Clinton* to support the corporate liability theory. *See, e.g., Sinaltrainal v. Coca Cola Co.*, 256 F.Supp.2d 1345, 1358 (S.D. Fla. 2003), *aff'd in part, vacated in part and remanded*, 578 F.3d 1252 (11th Cir. 2009). That view misapprehends *Clinton*. In *Clinton*, this Court considered the expedited review provisions of the Line Item Veto Act which authorized "any individual adversely affected" to challenge the Act's constitutionality. Concluding that the term "individual" included corporations, the Court explained there was "no plausible reason why Congress would have intended to provide for such special treatment of actions filed by natural persons and to have precluded entirely jurisdiction over comparable cases brought by corporate persons." 524 U.S. at 429. *Accord United States v. Middleton*, 231

F.3d 1207, 1210 (9th Cir. 2000) (holding that federal statute criminalizing the hacking of a computer system "of one or more individuals" covered hacking into a corporate computer). Yet *Clinton* did not announce a sweeping redefinition of the term "individual." The Court carefully confined its holding to the particulars of that case, noting that Congress did not intend for the broad definition of "individual" in the Line Item Veto Act's expedited review provisions to "dictate in other contexts." *Clinton*, 524 U.S. at 429 n. 14.

Here, nothing in the TVPA indicates the need to depart from the traditional presumption described in *Clinton* and routinely applied by this Court. Reading the term "individual" in the TVPA not to include private companies does not yield an absurd result. Nor will it "render nugatory the benefits that [the TVPA] still provides to individuals." *Rowland*, 506 U.S. at 211. Victims of torture and extrajudicial killing still can sue the individuals who actually engaged in those horrific acts. While personal jurisdiction doctrines may impede some suits, experience under the TVPA demonstrates that such hurdles, which Congress anticipated, have not proven insurmountable. *See, e.g., Jean v. Dorelien*, 431 F.3d 776 (11th Cir. 2005); *Cabello v. Fernandez-Larios*, 402 F.3d 1148 (11th Cir. 2005) (*per curiam*); *Lizarbe v. Rondon*, 642 F. Supp. 2d. 473 (D. Md. 2009); *Abiola v. Abubakar*, 435 F. Supp. 2d 830 (N.D. Ill. 2006); *Chavez v. Carranza*, 413 F. Supp. 2d 891 (W.D. Tenn. 2005). *See also* S. Rep. No. 102-249 at 7 (1991) ("First and foremost, only defendants over which a court in the United States has personal jurisdiction may be sued. In order for a Federal court to obtain personal jurisdiction over a defendant, the individual must have 'minimum contacts' with the forum state,

for example through residency here or current travel. Thus, this legislation will not turn U.S. courts into tribunals for torts having no connection with the United States whatsoever.") (footnote omitted) Consequently, there is no need to look beyond the plain meaning of the term "individual" to conclude that the corporate liability theory is incompatible with the TVPA. *See United States v. Ron Pair Enters.*, 489 U.S. 235, 239-41 (1989).

B. The legislative history, statutory structure and underlying purpose of the TVPA all support rejection of the corporate liability theory.

Even if the plain meaning of "individual" does not resolve the interpretive question, other indicia of legislative intent support *amici*'s view. Here, the legislative history, statutory structure and underlying purpose all point in the same direction: Congress did not intend for the statute to cover private companies.

1. Legislative history

The legislative history supplies perhaps the most compelling evidence. *See Hertz Corp. v. Friend*, 130 S. Ct. 1181, 1194 (2010) (consulting legislative history). While the committee reports immediately preceding the Act's passage do not directly address the question of corporate liability, *see* S. Rep. No. 102-249 (1991); H.R. Rep. No. 102-367 (1991), evolution in the language from early versions of the bill demonstrates that the term was chosen in order to exclude private companies from liability.

Following adoption of a joint resolution in 1984 condemning torture, Congress began to consider various bills to authorize a federal cause of action for

victims of torture. *See* 134 Cong. Rec. H9692-93 (1988) (statement of Rep. Yatron). Early versions of the bill described the category of possible defendants in broad terms – to include any "person" who subjected another to torture. *See* H.R. 4756, 99th Cong. (1986); H.R. 1417, 100th Cong. (1987).

In 1988, the bill underwent a critical change. Representative Jim Leach of Iowa, the ranking minority member on the relevant subcommittee of the House Foreign Affairs Committee, proposed an amendment ("the Leach Amendment") during a full-committee mark-up of the bill. *See* The Torture Victim Protection Act: Hearing and Mark-Up on H.R. 1417 before the H. Comm. On Foreign Affairs, 100th Cong. 82, 87-88 (1988) ("*Mark-Up Report*"). *See also Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 130 S. Ct. 1605, 1619 n. 14 (2010) (relying on committee mark-up as an informative source of legislative history): *Regan v. Wald*, 468 U.S. 222, 238 (1984) (same); *Washington v. Confederated Bonds & Tribes of Yakima Indian Nation*, 439 U.S. 463, 491 & n. 36 (1979) (same). ***The express purpose of the Leach Amendment was to clarify that the bill did not apply to corporations.*** This purpose was spelled out at the markup hearing on the bill:

> Mr. Leach: [B]efore bringing it to a vote, I would ask unanimous consent that an amendment be considered at a later point with staff that relates to a precise definition of person to make it clear we are applying it to individuals *and not to corporations* in how this bill and its ramifications unfold.
>
> If that is accepted, I would be very pleased. If it is not accepted, I still strongly support the bill.

...

Mr. Bellis [legislative counsel]: As I understand it, the intention is to limit the application of this civil action so that only individuals who engaged in torture could be the defendants.

Mr. Leach: Yes, that is correct.

Mr. Bellis: That would be a fairly simple amendment of changing the word "person" to "individuals" in several places in the bill.

Mr. Leach: That is correct, and I will have draft language to that effect.

...

Chairman Fascell: Is there any objection or further question? Then the question is on the resolution as proposed to be amended. All those in favor, signify by saying aye, all those opposed, no. They ayes have it. It is so agreed.

Mark-Up Report at 87-88 (emphasis added).

Following this change, both the House Foreign Affairs Committee and the House Judiciary Committee unanimously recommended the bill containing language that reflected the Leach Amendment. The approved version described the class of potential defendants to be every "individual" who engaged in torture or extrajudicial killing. H.R. Rep. No. 100-693, pt. 1, at 1; *Mark-Up Report* at 111; 134 Cong. Rec. H9692 (1988) (containing text of H.R. 1417). In October 1988, the House approved a version of the bill containing the Leach Amendment by a voice vote, 134 Cong. Rec. H9695 (1988).

Following this October 1988 vote, subsequent House versions of the bill consistently employed the

term "individual," reflecting the Leach Amendment. H.R. 1662, 101st Cong. (1989); 135 Cong. Rec. H6423 (1989) (containing text of H.R. 1662); H.R. Rep. No. 101-55, pt. 1 at 1 (1989) ("The purpose of the legislation is to provide a Federal cause of action against any individual who, under color of law of any foreign nation, subjects any individual to torture or extrajudicial killing."); H.R. Rep. No. 102-367, pt. 1 at 1 (same). *See also* 137 Cong. Rec. H11244 (1991) (containing text of H.R. 2092 and reflecting a change in the description of defendants from "every individual" to "[a]n individual").

Senate versions of the bill followed a similar course, and the Senate eventually approved a version containing a narrow description of the potential defendants like that employed in the Leach Amendment. Early Senate versions of the bill, like their early House counterparts, described the class of eligible defendants in broader terms to include "[e]very person who, under actual or apparent authority of any foreign nation subjects any person to torture or extrajudicial killing." S. 2628, 99th Cong. (1986); 132 Cong. Rec. 12950 (1986) (text of S. 2628 introduced by Senator Specter). *See also* S. 824, 100th Cong. (1987); 133 Cong. Rec. S3740 (1987) (text of S. 824 introduced by Senator Specter); S. 1629, 101st Cong. (1989); S. 313, 102d Cong. (1991); Torture Victim Protection Act of 1989, Hearing Before the Subcomm. on Immigration and Refugee Affairs, of the S. Comm. on the Judiciary, 101st Cong. 2d Sess. 2 (1990).

The critical change in the Senate version occurred in November 1991. At that time, the Senate Judiciary Committee reported a version of the bill (S. 313) replacing its broader definition of the category of potential defendants ("every person") with a version

that, in relevant part, employed language comparable to the House version which, by that time, reflected the Leach Amendment. *See* S. Rep. No. 102-249 at 2. The revised version defined the class of eligible defendants to include only "an individual who, under actual or apparent authority or under color of law of any foreign nation" subjects another individual to torture or extrajudicial killing. *See* 138 Cong. Rec. S2667 (1992).

Floor statements in the House and Senate reflect the significance of the Leach Amendment. For example, in a debate on the 1991 version of the bill, Representative Yatron, chairman of the Human Rights Subcommittee of the House Foreign Affairs Committee, explained that "[i]n order for a U.S. court to hear a claim under this legislation the defendant must have been acting under the authority of *his* or *her* government ...." 137 Cong. Rec. H11245 (1991) (emphases added).[3] Similarly, during debate in the

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[3] *See also* 134 Cong. Rec. H9693 (1988) (statement of Rep. Swindall) ("The individual must be subject to the personal jurisdiction of the Federal district court either by being present in the jurisdiction or by means of the long-arm statute."); *id.* H 9694 (statement of Rep. Mazzoli) ("Thus, under this bill, no longer will torture victims have to stand by helplessly while their torturers enter and leave the jurisdiction of the United States untouched."); 135 Cong. Rec. H6424 (1989) (statement of Rep. Smith) ("[We cannot allow individuals to get away with conduct that violates the most basic human rights because the countries that authorize or condone such conduct do not provide effective remedies to the victims."); *id.* H6423 (statement of Rep. Brooks) ("[T]his legislation states that any individual committing such acts under color of law of any foreign nation shall be liable ..."); *id.* H6427 (statement of Rep. Gilman) ("This act gives an injured party or his legal representative the right to take civil action against an individual who, under the color of law of any foreign nation, subjects any individual to suffering from

Senate, one of its chief architects, Senator Arlen Specter, described the bill as "provid[ing] a cause of action against the *individual(s)* responsible for the torture and not against the foreign state or Government ..." 138 Cong. Rec. S2668 (1992) (emphasis added).[4]

"Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language." *INS v. Cardozo-Fonseca*, 480 U.S. 421, 442-43 (1987). In this case, the legislative history demonstrates that Congress discarded the broader term "person" in favor of the term "individual." The Leach Amendment shows that Congress did so in order to exclude private companies from the class of potentially liable defendants.

Contrary to the weight of this legislative history, some district courts have seized on a single passage from a Senate report to support the proposition that the term "individual" was used solely to clarify that foreign states could not be proper defendants. *Sinaltrainal*, 256 F. Supp. 2d at 1358 (citing S. Rep. No. 102-249 at 7 (1991)). *See also* H.R. Rep. No. 102-367, pt. 1, at 4 (1991). While that reference to the

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mental or physical pain inflicted for the purpose of obtaining a confession, punishment or coercion.").

[4] *See also* 138 Cong. Rec. S2667 (1992) (statement of Sen. Inouye) (describing the act to authorize a "civil action for recovery of damages from an individual who engaged in torture or extrajudicial killing..."); *id.* (statement of Sen. Specter) ("[O]nly defendants over which a U.S. court has personal jurisdiction may be sued. In order for a court to have personal jurisdiction over a defendant, that individual must have minimum contacts with the jurisdiction.").

Senate report is technically accurate, it does not follow that Congress intended to embrace the corporate liability theory. For one thing, it would be odd to credit the Senate version of the bill when, as noted above, the Senate replaced its broader description of the defendants ("Every person") with the narrower one ("an individual") comparable to the previously adopted Leach Amendment. For another thing, the language from the Senate Report merely suggests that exclusion of foreign states as defendants was one purpose and does not state or otherwise imply an intent to *include* private companies among the categories of potentially liable defendants. When Congress only wants to exclude foreign states from liability, it knows how to do so expressly in the statute's text. *See, e.g.*, 18 U.S.C. §2337(2) (excluding foreign states from causes of action under civil antiterrorism statute). Finally, even if this excerpt from the Senate Report is given "full credit" as the expression of legislative intent (a purpose undone, to a degree, by subsequent amendments to the Foreign Sovereign Immunities Act, 28 U.S.C. §1605A), that excerpt cannot rewrite the language actually adopted by Congress. At most, the excerpt from the Senate report demonstrates that Congress inadvertently omitted private companies from the statute's ambit through the use of the narrow term "individual."

2. Statutory structure

Like the legislative history, the statutory structure also supports a construction of the term "individual" not to include private companies. Normal rules of statutory interpretation instruct that "identical words used in different parts of the same act are intended to have the same meaning." *Commissioner v. Lundy*, 516 U.S. 235, 250 (1996). In this case, the

TVPA uses the term "individual" twelve times. Not only does it use the term "individual" to describe the range of possible defendants (the usage at issue in this case), it also employs the term "individual" to describe the victims whose torture can give rise to a claim. TVPA §2(a)(1)-(2). A private business entity cannot be tortured, killed or endure severe pain or suffering. Consequently, it cannot be an "individual" when the TVPA uses the term to describe a victim of such conduct. Thus, at least in the context of the TVPA, it make no sense to interpret the term "individual" to encompass the corporate liability theory. To conclude otherwise would flout this Court's instruction that "[a]bsent some congressional indication to the contrary, [courts should] decline to give the same term in the same Act a different meaning depending on whether the rights of the plaintiff or the defendant are at issue." *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 101 (2003).

Congress knows how to broaden the class of covered parties when it chooses to do so. In the very same section defining the class of potential defendants, the TVPA describes the class of potential claimants to include "any *person* who may be a claimant in an action for wrongful death." TVPA §2(a)(2) (emphasis added). This broader use, added during the mark-up of the House bill, makes sense, for it enables other entities such as estates of victims to bring causes of action under the TVPA. *See generally* 137 Cong. Rec. H11245 (1991) (statement of Rep. Mazzoli) (explaining change in phrasing). The contrasting use of "person" and "individual" within the very same section of the TVPA further illustrates Congress's intent not to depart from the ordinarily narrow meaning of the term "individual."

3. Statutory purposes

Finally, interpreting the TVPA not to embrace the corporate liability theory comports with the Act's animating purposes. *Dole Food Co. v. Patrickson*, 538 U.S. 468, 484 (2003) (Breyer, J., concurring in part and dissenting in part) ("Judges are free to consider statutory language in light of a statute's basic purpose."). Here, the TVPA's preamble, the only express statement of purpose on the statute's face suggests that it was not designed to encompass the corporate liability theory. The preamble explains that the TVPA "carr[ies] out obligations of the United States under the United Nations Charter and other international agreements pertaining to the protection of human rights" and fulfills this purpose "by establishing a civil action for recovery of damages *from an individuai* who engages in torture or extrajudicial killing." TVPA Preamble (emphasis added). Thus, the only expressly stated purpose re-enforces what the text already makes plain – an intent to limit the class of potential defendants. Any other purpose at best can only be inferred.

To the extent an inquiry into implied purposes is appropriate, the history surrounding the TVPA's enactment suggests two narrow purposes. First, Congress wanted to authorize a cause of action for torture or extrajudicial killing. *See* H.R. Rep. No. 100-693, pt. 1 at 3 (1988); H.R. Rep. No. 101-55, pt. 1, at 3 (1989); H.R. Rep. No. 102-367, pt. 1, at 4. Prior to the TVPA's enactment, federal appellate courts disagreed over whether such a cause of action was cognizable under the Alien Tort Statute, 28 U.S.C. §1350. *Compare Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), *with Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 812-23 (D.C. Cir. 1984)

(opinion of Bork, J.). (Later this Court in *Sosa v. Alvarez-Machain* confirmed that the Alien Tort Statute is merely jurisdictional and does not create any cause of action. 542 U.S. 692, 712-14 (2004)). Second, Congress wanted to ensure that United States citizens could be plaintiffs. H.R. Rep. No. 101-55 at 3; H.R. Rep. No. 102-367 at 4; 134 Cong. Rec. 9693 (1988) (statements of Reps. Yatron and Swindall). Prior to the TVPA's enactment, plaintiffs invoked the Alien Tort Statute, which is confined to suits by aliens, 28 U.S.C. §1350.

Some district courts have seized on isolated snippets from the TVPA's history to discern a more general purpose to deter torture in all its forms. *See Wiwa v. Royal Dutch Petroleum Co.*, No. 96 CIV. 8386(KMW), 2002 WL 319887, at *16 (S.D.N.Y. Feb. 28, 2002). They reason from this premise to the conclusion that the corporate liability theory advances this general deterrent purpose. The TVPA's purposes do not sweep so broadly. Indeed, if anything, the legislative record suggests Congress's purpose was to craft a narrow remedy.

"[N]o legislation pursues its purposes at all costs," and the TVPA is no exception. *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987). This Court's decision in *Sosa* is instructive on this point. There, this Court cautioned federal courts against expanding the reach of United States statutes based on international law and involving extraterritorial conduct. *See Sosa*, 542 U.S. at 725-28. Reasons for that caution included, among others, interference with both the foreign relations of the United States and separation of powers principles that vest Congress with the power to regulate federal causes of action.

While *Sosa* involved a judicially created cause of action, many of the same reasons underpinning that decision apply in this context of judicial construction of a congressionally created cause of action predicated on an international norm and regulating extraterritorial conduct – a point that the political branches recognized when debating passage of the TVPA. *See Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 86-87 (D.C. Cir. 2011) (Kavanaugh, J., dissenting). Within the section of the TVPA entitled "establishment of a civil action," Congress included an exhaustion requirement, reflecting an awareness of the law's potential to tread upon the sovereign interests of other nations. TVPA §2(b). Reports surrounding consideration of the legislation stress Congress's desire not to "turn U.S. courts into tribunals for torts having no connection with the United States whatsoever." S. Rep. No. 102-249 at 7. During legislative debates on the bill, members of Congress repeatedly stressed that the bill would not open the federal courts "to lawsuits that have absolutely no connection ... to the United States" and would not "entangle the judiciary in sensitive foreign policy matters." *See, e.g.*, 138 Cong. Rec. S2667-2669 (1992) (colloquy between Senators Specter and Grassley stressing the TVPA's limited sweep). Likewise, when signing the bill, the President recognized that unbridled application of the TVPA could disrupt United States foreign relations and open the floodgates of the federal courts. Statement on Signing the Torture Victim Protection Act of 1991, 28 Weekly Comp. Pres. Docs. 465-66 (Mar. 12, 1992) (noting the "danger that U.S. courts may become embroiled in difficult and sensitive disputes in other countries, and possibly ill-founded or politically motivated suits,

which have nothing to do with the United States and which offer little prospect of successful recovery").

A generalized deterrence rationale flies in the face of the political branches' careful work. Suits predicated on the corporate liability theory discourage essential investment in the developing world. TVPA litigation against corporations involves alleged conduct taking place in over a dozen different countries, including many in the developing world, whether Africa, Latin America or Southeast Asia. *See, e.g., Wiwa*, 2002 WL 319887 (Nigeria); *Beanal v. Freeport-McMoran, Inc.*, 969 F. Supp. 362 (E.D. La. 1997) (Indonesia); *Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242 (11th Cir. 2005) (*per curiam*) (Guatemala). Some of these regions are politically unstable, and constructive engagement by private corporations represents the only means by which these countries can hope to achieve economic growth and eventual political stabilization. *See* World Bank, *Swimming Against The Tide: How Developing Countries Are Coping With The Global Crisis* (2009) (discussing the relationship between foreign investment and economic growth in the developing world). TVPA suits against private companies discourage that essential investment and weaken the prospects for the development of stable political institutions.

Not only do such suits undermine economic growth in the developing world, they hurt growth in the United States as well. Foreign investment is critical to the United States economy. *See* U.S. Dep't of Commerce, The U.S. Litigation Environment and Foreign Direct Investment: Supporting U.S. Competitiveness by Reducing Legal Costs and Uncertainty at 2 (2008). Such growth occurs when multinational companies establish a business presence in

the United States, often through one or more United States-based subsidiaries. By dragging foreign companies into United States Court on the basis of their alleged overseas activities, TVPA claims discourage such important investment. Such suits are occurring with alarming frequency. *See, e.g., Shan v. China Const. Bank Corp.*, No. 09 Civ. 8566(DLC), 2010 WL 2595095 (S.D.N.Y. June 28, 2010) (Chinese company); *Doe v. Nestle, S.A.*, 748 F. Supp. 2d 1057 (C.D. Cal. 2010) (Swiss company); *Mastafa v. Australian Wheat Bd. Ltd.*, No. 07 Civ. 7955(GEL), 2008 WL 4378443 (S.D.N.Y. Sept. 25, 2008) (Australian and French companies); *Arndt v. UBS AG*, 342 F. Supp. 2d 132 (E.D.N.Y. 2004) (Swiss bank); *Wiwa v. Royal Dutch Petroleum Co.*, 2002 WL 319887 (Dutch and United Kingdom companies). Some cases may involve multiple steps of imputation – imputing the conduct of one overseas affiliate back to the foreign parent for liability purposes and then imputing the jurisdictional contacts of the United States subsidiary back to the foreign parent in order to establish general jurisdiction. *See, e.g., Bauman v. DaimlerChrysler Corp.*, 644 F.3d 909 (9th Cir. 2011) (suing German parent on theory that relies on alleged conduct of Argentinean subsidiary and alleged jurisdictional contacts of American subsidiary). No company relishes the prospect of being branded a torturer (even if the suit is ultimately dismissed), and the prospect of such liability in United States courts for their alleged overseas activities may persuade some foreign companies to pull out of the United States altogether; for others it may have a noticeable chilling effect on additional U.S. investment.

Whether targeted at domestic companies or their foreign counterparts, such suits subject companies to damaging attacks on their reputation and potentially

their share value. For example, in the *Sinaltrainal* litigation against Coca-Cola, some suits were filed around the time of the company's first-quarter earnings meeting and prompted some shareholders to dump the company's stock. *See* Joshua Kurlantzick, *Taking Multinationals to Court: How the Alien Tort Act Promotes Human Rights*, World Pol'y J. 60, 64 (Spring 2004). During multi-year litigation, the company bears the stigma with no meaningful redemption after dismissal of the case. Litigation involving TVPA claims against the Drummond Company based on its alleged activities in Colombia supplies a good example. Though the company was exonerated altogether, *Romero v. Drummond Co.*, 552 F.3d 1303, 1313 (11th Cir. 2008), the plaintiffs' lawyers explained that the maintenance of the litigation was their primary interest. They publicly admitted that they were "not in a hurry for the cases to be resolved, *because as long as they stay tied up in the courts, they will continue to receive attention in the media.*" Malcolm Fairbrother, *Colombia, Human Rights and U.S. Courts: An Interview with Daniel Kovalik*, *available at http://clas.berkeley.edu/Events/spring2002/04-25-02-kovalik/index.html* (emphasis added). The damage caused by such reputational attacks supplies an additional reason counseling against judicial expansion of liability under the TVPA beyond the narrow scope expressly authorized by Congress. *See Stoneridge Inv. Partners LLC v. Scientific-Atlanta, Inc.*, 552 U.S. 148, 164 (2008).

For these reasons, a generalized deterrent purpose should not be read into the statute or used to support the corporate liability theory.

C. The Eleventh Circuit's view, embracing the corporate liability theory, lacks any legal support.

Given that all the tools of statutory interpretation point in the same direction, it is perhaps unsurprising that only one federal appellate court – the Eleventh Circuit – has embraced the corporate liability theory. Close examination of the Eleventh Circuit's three precedents on this point reveals a total dearth of legal support for this outlier view. The earliest precedent, *Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242 (11th Cir. 2005) (*per curiam*), vacated a district court's order dismissing, in relevant part, TVPA claims against a private company. Nothing in *Aldana* suggests that the issue of corporate liability was before the Eleventh Circuit; rather, its opinion addresses whether the conduct allegedly committed by the primary tortfeasor (Guatemalan security forces) satisfied the definition of torture under the TVPA. The second precedent, *Romero*, stated that "the Torture Act allows suits against corporate defendants." 552 F.3d at 1315. *Romero* offered no reasoning in support of that proposition but simply (and inexplicably) cited the prior decision in *Aldana* as binding Circuit precedent on the point. The third precedent, *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1264 n.13 (11th Cir. 2009), again merely restated the *Romero* rule without any reasoning. Thus, the only federal appellate court expressly embracing the corporate liability theory has not offered any reasoning whatsoever in support of that rule.

D. Common law imputation principles may not be relied upon to circumvent the TVPA's explicit textual limits.

Notwithstanding the congressionally imposed limits on the potential defendants under the TVPA, some district courts have suggested that the corporate liability theory may be proper under common law agency principles imputing certain employee torts to the employer. *Wiwa*, 2002 WL 319887 at *13. This theory is incompatible with the TVPA and should be rejected.

This theory cannot be reconciled with the TVPA's text, which confines the range of eligible defendants to "individuals." Moreover, for a TVPA claim to be cognizable, the individual must be acting "under actual or apparent authority, or color of law, of any foreign nation." Employees of private companies do not act under actual or apparent authority or color of law of a foreign nation; their authority is defined, instead, by the company employing them. Even if it were possible for a private company's employee to shift roles – to assume the authority of a foreign nation or act under its color of law – then the employee is no longer acting within the scope of his or her employment, and principles of corporate imputation would not apply.

Moreover, this theory of imputation is incompatible with the TVPA's structure. The TVPA limits liability to those individuals who "subject" another individual to torture. The verb "subject" is commonly understood to mean "to cause to undergo" or "to submit to" and has been previously been interpreted by this Court as a term that "cabins the range of misconduct that the statute proscribes." *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 644-45 (1999). Applying

principles of imputation to the TVPA runs contrary to the TVPA's express terms. *Cf. Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2302-03 & n. 6 (2011) (statutory terms should not be construed so as to obliterate the distinction between those who are primarily liable and those who are, at most, secondarily liable).

Congress knows perfectly well how to impute acts of torture to parties other than the primary wrongdoer. Recent amendments to the FSIA, post-dating the TVPA's enactment, impute to certain state-sponsors of terrorism acts of torture or extrajudicial killing perpetrated by an "official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency." 28 U.S.C. §1605A. *See also* 28 U.S.C. §1605(a)(5) (imputing foreign official's noncommercial torts to foreign state). Similarly, the federal criminal torture statute, imposes criminal liability not only on certain individuals who commit but also on persons who "conspires to commit an offense" under the statute. 18 U.S.C. §2340A. Because Congress declined to construct a similar scheme for civil liability under the TVPA, the Court should not engraft one onto the statute.

CONCLUSION

For the foregoing reasons, *amici* urge this Court to hold that the term "individual," when used in the TVPA to describe the category of possible defendants, does not include private companies.

Respectfully submitted,

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December 2011

AMICUS CURIAE BRIEF

Nos. 10-1491 & 11-88

IN THE
Supreme Court of the United States

ESTHER KIOBEL, *et al.*,
Petitioners,

v.

ROYAL DUTCH PETROLEUM CO., *et al*
Respondents.

ASID MOHAMAD, *et al.*,
Petitioners,

v.

PALESTINIAN AUTHORITY, *et al.*,
Respondents

On Writs of Certiorari to the United States Court of Appeals for the Second and District of Columbia Circuits

BRIEF OF *AMICI CURIAE* DR. JUAN ROMAGOZA ARCE, CECILIA SANTOS MORAN, AND KEN WIWA IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE* [1]

For decades now, victims of human rights abuses have used the Alien Tort Statute, 28 U.S.C. §1350 ("ATS") and later the Torture Victim Protection Act, 28 U.S.C. §1350, note ("TVPA"), to seek redress against those responsible—natural persons, organizations, and corporations alike—for perpetrating the abuses against them. For these victims, the results have been profound. The cases have afforded them the opportunity to hold the perpetrators to account, thereby obtaining a measure of justice for themselves and their families; to establish a truthful historical record; and to contribute to broader efforts to deter human rights abuses. Indeed, these cases have marked "a small but important step in the fulfillment of the ageless dream to free all people from brutal violence." *Filártiga v. Peña-Irala*, 630 F.2d 876, 890 (2d Cir. 1980).

Despite this "important step" in the march toward the protection and promotion of human rights, this case presents the question of whether some human rights victims will be denied access to justice simply because the party responsible for those abuses is a non-natural person. In other words, this case will determine whether victims of the most severe human rights crimes, including genocide, crimes against humanity, extrajudicial killing and torture, will be artificially divided into two classes—with one class afforded access to U.S. courts and all of the rights

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[1] Pursuant to Rule 37.6, *amici curiae* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

and benefits that derive from such access; and another class denied access to U.S. courts, and thus denied a means to adequately redress the harms they have suffered.

Amici curiae are survivors of egregious human rights violations who have sued, under the ATS and TVPA, those responsible for the human rights crimes inflicted upon them. In light of their experiences, *amici curiae* are uniquely qualified to explain how important it is to file TVPA and ATS lawsuits, not only for themselves, but also for their families and communities. Their litigation experiences compel *amici curiae* to conclude that denying the very real and tangible benefits of participating in these lawsuits to victims of human rights abuses committed at the behest of corporations, organizations, or other juridical entities would signify a manifestly unjust step backward in the "dream to free all people from brutal violence."

SUMMARY OF ARGUMENT

Amici curiae submit that perpetrators of gross human rights violations like torture and extrajudicial killing are *hostis humani generis*—the enemy of all mankind—regardless of their juridical form. Indeed, human rights crimes are not perpetrated by people acting alone. To the contrary, they are designed, orchestrated, financed, and supported by states, organizations, corporations, and other non-natural persons. A decision to exempt these non-natural persons from liability would therefore result in impunity and a license to engage in, and even profit from, these universally-condemned crimes.

Congress intended the ATS and TVPA to serve as critical bulwarks against such impunity. They do so

by providing human rights victims an opportunity to seek redress and to hold those who can and should be held accountable, whether that is the person who directly perpetrated the abuse, or the organization or entity that ordered, directed, or aided and abetted the abuse.

Indeed, as *amici curiae* know well from their personal experiences, human rights abuses are generally conducted in circumstances that make it difficult to identify the person who directly abused them or their loved ones. But victims are often able to identify the organization or entity that armed, supplied, ordered, or claimed responsibility for the abuses. From the perspective of *amici curiae*, those with the power or authority to order, and also to stop or prevent these horrific abuses are at least as culpable, if not more so, for their role in perpetrating these crimes. Accordingly, *amici curiae* submit that when the culpable party is an organization or corporation that is sufficiently connected to the United States to establish personal jurisdiction, they should, provided all other statutory requirements are satisfied, be subject to suit here.

Amici curiae have suffered searing pain as a result of egregious violations of customary international law. The experiences of *amici curiae* confirm that ATS and TVPA lawsuits help to relieve that pain by securing judicial acknowledgment of the abuses they endured, enabling survivors to break the silence surrounding their abuses, and contributing to anti-impunity efforts, which benefit themselves and their communities.

For these reasons, *amici curiae* urge the Court to maintain the opportunity for *all* survivors of human rights abuses to seek redress against those who can

and should be held to account for the egregious crimes perpetrated against them, regardless of whether the culpable party is a corporation, organization, or other non-natural person.

ARGUMENT

I. VICTIMS MUST HAVE THE RIGHT TO SEEK REDRESS AND ACCOUNTABILITY AGAINST CORPORATIONS AND ORGANIZATIONS THAT PARTICIPATE IN HUMAN RIGHTS ABUSES.

The ATS and TVPA serve the dual purposes of denying human rights abusers impunity and providing victims relief for the harms they suffered. This Court has described the TVPA as "a clear mandate" that "establish[es] an unambiguous and modern basis for federal claims of torture and extrajudicial killing." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 728 (2004) (quoting H.R. REP. No. 102-367, at 3, 102d Cong. 1st Sess. (1991)) reprinted in 1992 U.S.C.C.A.N. 84). The Congressional mandate is clear because the TVPA and ATS provide redress for crimes that unequivocally violate the law of nations. *See, e.g., Filártaga*, 630 F.2d at 884 ("official torture is now prohibited by the law of nations. The prohibition is clear and unambiguous . . ."); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1542 (N.D. Cal. 1987) (the "proscription of summary execution or murder by the state appears to be universal, is readily definable, and is of course obligatory.").[2]

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[2] The TVPA likewise reflects the intent of the Executive Branch. While the TVPA was pending before Congress, the Reagan Administration expressed the United States' view that "torture, like hijacking, sabotage, hostage-taking and attacks on internationally protected persons, is an offense of special inter-

What is also clear is that these heinous violations are often committed in concert with organizations and corporations. Thus, to give effect to the goals of the TVPA and the ATS, victims must be able to seek redress against non-natural persons when evidence establishes their complicity in their injuries.

A. Excluding Non-Natural Persons From Liability Creates an Artificial and Unjust Divide Among Human Rights Victims.

The indignities suffered by human rights victims result in incalculable harm irrespective of whether the party responsible for the indignities is a natural person or a corporation or organization. *Amici curiae* submit that it would be therefore anomalous and unjust to exempt non-natural persons from liability.

1. *Perpetrators with "blood on their hands" do not act alone.*

As a practical matter, victims often cannot identify the natural persons who personally and directly perpetrated the human rights crimes against them or their loved ones. That is of course by design. Those who perpetrate these types of atrocities often purposefully do so in circumstances that deny the victims the ability to identify them. They blindfold their victims or otherwise deprive them of their senses; take them to undisclosed locations in the dark

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national concern, and should have similarly broad, universal recognition as a crime against humanity, with appropriate jurisdictional consequences," including being held responsible "by any state in which the alleged offender is found." Message from the President of the United States Transmitting the Convention Against Torture S. Treaty Doc. No. 100-20, at 9 (1988).

of night; rotate turns among those perpetrating the abuse; and rarely allow witnesses to observe their crimes.

However, and significantly for human rights victims, the person who directly commits the abuses does not act alone. Generally, the perpetrator acts at the behest of a government or an organization or other juridical entity. The perpetrators may announce that they are acting on behalf of a known group or organization; they may wear uniforms, insignia or logos identifying their association with a particular group; or the victims may be held in a location controlled by a particular group or entity. As a result, while the identity of the direct perpetrator may be unknown, victims are often able to ascertain the identity of the party responsible for ordering or aiding and abetting the abuse.

That is precisely the situation that *amici curiae*, Cecilia Santos Moran and Dr. Juan Romagoza Arce, endured. In September 1980, *amica* Santos was a math student at the National University in San Salvador, El Salvador. One day while she was at the *Supermercados Todos*, a shopping center in San Salvador, two private security officers entered the bathroom and took her to the basement of the shopping center. Later, two more men arrived and forced her into a taxi that eventually dropped her off near the headquarters of the National Police.

After the taxi stopped, one of her captors grabbed Santos' arm and walked her into the National Police building. Once inside, Santos was taken to the second floor, blindfolded, and led through a tunnel to a small room with a desk. Despite the blindfold, as she walked, Santos could feel and hear bodies of people on the tunnel floor in pain and crying.

Once inside the room, Santos, still blindfolded, was interrogated, sexually assaulted, and tortured. The men threatened to harm her family, poured acid on her hands, inserted Q-tips soaked with acid in her nostrils, and applied electrical shocks to her arms, hands, mouth and breasts, causing her extreme pain. Santos nearly lost consciousness each time the shocks were applied. When they eventually removed the blindfold, Santos saw that the men wore masks. However, she also saw that two of her interrogators wore civilian clothes and that two of them wore khaki pants, khaki shirts, and boots—the typical uniform of the National Police.

After three years in detention, *amica* Santos fled to the United States. She and four other Salvadorans later filed a lawsuit, under the ATS and TVPA, against Colonel Nicolás Carranza, a former Vice Minister of Defense, who had relocated to Memphis, Tennessee. A jury found Colonel Carranza liable, under the doctrine of command responsibility, for the brutal torture suffered by Santos. A key aspect of the trial was Santos' testimony establishing that she was held captive and tortured by the Salvadoran National Police, which was under the command and control of Colonel Carranza. Because the crimes were part of a widespread and systematic campaign of abuses, the jury also found Colonel Carranza liable for crimes against humanity. *See generally Chavez v. Carranza*, Second Am. Compl., ¶¶ 31-38 (W.D. Tenn. 2002) (No. 03-2932); *Chavez v. Carranza*, 559 F.3d 486, 499 (6th Cir. 2009).

Amicus Dr. Romagoza was also among the many innocent civilians who were tortured during the repressive campaign of violence unleashed by the Salvadoran government in the 1970s and 1980s. Born in Usulutan, El Salvador, Dr. Romagoza entered medical school at the University of El Salvador in 1973. As part of his medical training, Dr. Romagoza set up medical clinics and provided health education to the underserved in the poor areas of San Salvador and neighboring communities.

In December 1980, as he was working at a church clinic, two vehicles carrying soldiers from the army and National Guard arrived and opened fire on the clinic. Dr. Romagoza was shot in the foot, then blindfolded and taken by helicopter to a local army garrison.

The next day, Dr. Romagoza was transferred to the National Guard headquarters in San Salvador. For 22 straight days, he was interrogated, beaten and tortured. For example, at the end of his second day of detention, while Dr. Romagoza was chained to an iron rod, naked and wounded, the Guardsmen administered electric shocks to his ears, tongue, testicles, anus, and the edges of his wounds until he lost consciousness. The Guardsmen forced him to regain consciousness by kicking him or burning him with cigarettes. Additionally, the Guardsmen anally raped him with foreign objects and subjected him to water torture and asphyxiation with a hood containing calcium oxide. During one session, his torturers shot him in his left hand and taunted him that he would never be able to perform surgery again.

During his entire ordeal, Dr. Romagoza did not learn the identities of the Guardsmen who personally tortured him. However, from his experiences, he knew who was responsible for ordering his torture: he knew that he was being detained at the headquarters of the National Guard, and he saw General Carlos Eugenio Vides Casanova, then Director General of the National Guard, during his detention.

After his release, Dr. Romagoza moved to the United States and was granted political asylum in 1983. Remarkably, he later learned that General Vides Casanova and General José Guillermo García (the latter was the Salvadoran Minister of Defense from 1979 to 1983) had also moved to the United States and were living out a comfortable retirement in southern Florida. Dr. Romagoza and two other plaintiffs filed suit against then under the TVPA and ATS. Although Dr. Romagoza did not see General García during his detention, he was able to offer extensive evidence about the role that General García had played in directing and ordering the brutality he suffered. In 2002, a jury found both Generals liable under the theory of command responsibility. *See generally Arce v. Garcia*, Second Am. Compl., ¶¶ 12-24 (S.D. Fla. 2000) (No. 99-8364); *Arce v. Garcia*, 434 F.3d 1254, 1259 (11th Cir. 2006).[3]

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[3] Courts have repeatedly held that the doctrine of command responsibility is an appropriate basis upon which to assert liability in ATS and TVPA cases. *See, e.g, Carranza v. Chavez*, 559 F.3d 486, 499 (6th Cir. 2009); *Ford v. Garcia*, 289 F.3d 1283, 1289 (11th Cir. 2002). From the perspective of *amici curiae*, there is no sound basis to recognize command responsibility but to deny other well-established principles of agency liability in the context of human rights crimes.

Thus, as was the case with *amica* Santos, in the case of Dr. Romagoza, the court recognized that liability rests not just with the perpetrator who directly applies the electrical shock, but also with the person who orders and supports that perpetrator. *Amici curiae* believe that, in a sense, those that control or authorize the abuse are even more culpable than those who directly inflict the harm. Thus, it would have been unjust if *amici curiae* Romagoza and Santos had been denied an opportunity for redress simply because the abuses they suffered were committed at the behest of a corporation or organization instead of high-ranking government officials.

2. *Non-natural persons should not escape liability when evidence establishes their complicity in human rights abuses.*

On November 10, 1995, *amicus* Ken Wiwa's father, Ken Saro-Wiwa, a highly acclaimed poet and leader of the Movement for the Survival of the Ogoni People ("MOSOP"), an organization formed to protest the deleterious effects of oil exploitation in the Ogoni region, was hanged in Port Harcourt, Nigeria. His death followed substantial efforts by the Nigerian authorities and Royal Dutch/Shell to silence MOSOP through ruthless acts of brutality and intimidation.

For example, from August to October 1993, Royal Dutch/Shell, acting through its subsidiary Shell Petroleum Development Company ("SPDC"), supported the Nigerian military as they attacked villages, killing over 1,000 people, displacing over 20,000 more, and destroying property using planes, boats and weapons paid for by Royal Dutch/Shell. *See generally Wiwa v. Royal Dutch Petrol. Co.*, (S.D.N.Y. Nov. 8, 1996) (No.

96 Civ. 8386); *Wiwa v. Shell Petrol., N.V.*, Fifth Am. Compl. (S.D.N.Y. Mar. 16, 2009) (No. 96 Civ. 8386).

On May 22, 1994, the Nigerian military arrested the entire MOSOP leadership, including Saro-Wiwa. In October 1995, after a sham trial, Saro-Wiwa and others were sentenced to death. They were beaten and denied food, water and bedding up until the day they were hanged.

Amicus Wiwa filed a lawsuit for the extrajudicial killing of his father under the ATS and TVPA. The case was actively litigated for over one decade before resulting in a settlement on the eve of trial. Following that settlement, *amicus* Wiwa said:

> "Although our journey to this victory has been drawn out and emotionally draining, we are extremely satisfied with the result. For fourteen years and more we have suffered our loss privately and publicly but for the most part we have endured our pains away from the media spotlight. It has been a lonely, agonizing and traumatic period for many of us, but we were sustained in our grief by this lawsuit, holding out for the day when we might finally be given the opportunity to exorcise our grief."

Ken Wiwa, Statement, June 8, 2009, *available at* http://www.ccrjustice.org/files/Wiwa_v_Shell_Statement_of_Pl.

3. *Satisfaction of jurisdictional and statutory requirements ensures that cases are properly before U.S. courts.*

Amici curiae submit that there is a common thread that runs through the cases of *amici curiae* Santos, Romagoza, and Wiwa. That thread is that they were all able to maintain lawsuits to redress the severe pain and anguish they suffered as a result of brutal human rights crimes committed at the direction of a third party with substantial and concrete ties to the United States.

In that regard, their cases are somewhat unique; most perpetrators of human rights crimes never come to, or have any connection with, the United States, thus remaining completely beyond the reach of U.S. courts. Given recent government efforts, their presence here is, for good reason, likely to become rarer still. According to government officials, since fiscal year 2004, Immigration and Customs Enforcement has removed over 400 human rights violators, and is currently pursuing over 1,900 leads and removal cases involving individuals suspected of engaging in human rights crimes from approximately 95 countries. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, *The Human Rights Violators and War Crimes Unit*, http://www.ice.gov/human-rights-violators/ (last visited December 19, 2011).

By contrast, organizations and corporations often choose to do business in the United States. In so doing, they can subject themselves to the jurisdiction of U.S. courts. In fact, in the case brought by *amicus* Wiwa, the Court of Appeals for the Second Circuit concluded that the defendants had sufficient ties with

the United States to establish personal jurisdiction. *Wiwa v. Royal Dutch Petrol. Co.*, 226 F. 3d 88, 98-99 (2d Cir. 2000).

After concluding that personal jurisdiction was satisfied, the court in *Wiwa* reversed the district court judgment dismissing the case on forum non-conveniens grounds, upon specifically finding that the district court judge had not given sufficient weight to the fact that the plaintiffs had brought suit under the ATS and the TVPA. The court stated, "in passing the Torture Victim Protection Act, Congress has expressed a policy of U.S. law favoring the adjudication of such [torture] suits in U.S. courts." *Wiwa*, 226 F.3d at 106. According to the court, the policy "favoring" U.S. courts is consistent with Congressional intent to provide a meaningful remedy to victims. "Congress noted that universal condemnation of human rights abuses 'provides scant comfort' to the numerous victims of gross violations if they are without a forum to remedy the wrong." *Wiwa*, 226 F.3d at 106 (quoting H.R. Rep. No. 102-367 at 3,

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[4] In addition to the requirement that persons establish sufficient contacts with the United States to permit personal jurisdiction, *Republic of Austria v. Altmann*, 541 U.S. 677, 713 (2004) (Breyer, J., concurring), there are other substantial barriers to such suits, including (i) the express exhaustion requirement in the TVPA, 28 U.S.C. 1350 note, § 2(b), and perhaps in the Alien Tort Statute, *see Sosa*, 542 U.S. at 733 & n.21; (ii) the *forum non conveniens* doctrine; (iii) the political question doctrine and "case-specific deference to the political branches," *Sosa*, 542 U.S. at 733 n.21; *see Altmann*, 541 U.S. at 714 (Breyer, J., concurring); (iv) the act of state doctrine; and (v) the substantive limitations placed on causes of action, such as the TVPA's limitation to torture and extrajudicial killing, and the Alien Tort Statute's limitation to "a handful of" "universal" norms with such "definite content" that they give rise to a federal common law cause of action under *Sosa*, 542 U.S. at 714, 732.

102d Cong., 1st Sess. (1991) reprinted in 1992 U.S.C.C.A.N. 85).

B. Holding Human Rights Abusers Accountable Provides Redress and Promotes Healing for Torture Survivors and Their Communities.

The core problem ATS and TVPA litigation addresses is *impunity* for perpetrators of gross human rights violations. Impunity creates a culture that allows abuse to continue—what is done without punishment can be repeated without fear. The prospect of repeated violations causes extreme anxiety for victims and undermines their sense of justice. The opportunity to seek redress and accountability, by contrast, promotes healing. Thus, ATS and TVPA litigation helps survivors and also their communities by, *inter alia*, providing judicial acknowledgement of their harm and breaking the silence that enables abusers to act with impunity.

1. *The ATS and TVPA are important vehicles for judicial acknowledgement of the harm suffered by human rights victims.*

The authoritative record of events created during a trial serves as a public acknowledgment of harms endured by survivors. This affords survivors a measure of what legal scholar Martha Minow has called "the key of formal justice." MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS: FACING HISTORY AFTER GENOCIDE AND MASS VIOLENCE, 26 (1998). Formal justice is significant because it represents "the determination of facts about the past, and a full, public, and official acknowledgement thereof." MICHELLE PARLEVLIET, CONSIDERING TRUTH:

DEALING WITH A LEGACY OF GROSS HUMAN RIGHTS VIOLATIONS, 16 Netherlands Q. of Hum. Rts. 143, 145 (1998).

Psychologists have found that official acknowledgment of the truth of survivors' stories counters the past denials or distorted versions of events and helps to alleviate the resulting trauma. *See* Jamie O'Connell, Gambling with the Psyche: Does Prosecuting Human Rights Violators Console Their Victims?, 46 HARV. INT'L L.J. 295, 320-23 (2005). Court judgments also provide a "direct, moral, and ethical response to victims on behalf of society that demonstrates the state is validating their innocence and their lack of culpability in the deeds." Laurel E. Fletcher & Harvey Weinstein, *Violence and Social Repair: Rethinking the Contribution of Justice to Reconciliation*, 24 HUM. RTS. Q. 573, 590 (2002).

In addition, the impartiality, solemnity, and formal procedures of U.S. courts provide plaintiffs a respectful forum to adjudicate their allegations. The respect and dignified treatment they are accorded, the perceived control over the litigation process, and the symbolic features of the procedures, provide tangible healing benefits to victims. E. Allan Lind et. al., *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System*, 24 LAW & SOC'Y REV. 953, 957-58 (1990). *Amicus* Romagoza observed that his lawsuit "first gave me the hope I needed in order to believe in justice, to believe that justice can come, particularly in this country, my new country, the USA." Romagoza, Statement, *supra*. This sentiment accurately reflects the political branches' judgment to authorize these lawsuits in the United States.

2. *Breaking the "conspiracy of silence" promotes healing for human rights victims and supports deterrence and justice efforts in their home countries.*

Research indicates that the "conspiracy of silence"—the absence of public discussion that frequently surrounds gross human rights violations—is detrimental to the recovery of survivors because it intensifies their sense of isolation and mistrust of society. *See* JUDITH HERMAN, TRAUMA AND RECOVERY: THE AFTERMATH OF VIOLENCE FROM DOMESTIC ABUSE TO POLITICAL TERROR 9, 93 (1997); *see also*, YAEL DANIELI, PRELIMINARY REFLECTIONS FROM A PSYCHOLOGICAL PERSPECTIVE, IN TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES 572 (Neil J. Kritz ed., 1995). By contrast, disclosing and sharing the crimes are important to a victim's recovery. *See, e.g.*, O'Connell, *supra* at 322. *Amicus* Dr. Romagoza characterized the significance of testifying at trial:

> "When I testified, a strength came over me. I felt like I was in the prow of a boat and that there were many, many people rowing behind—that they were moving me into this moment. I felt that if I looked back at them, I'd weep because I'd see them again: wounded, tortured, raped, naked, torn, bleeding. So, I didn't look back, but I felt their support, their strength, their energy. Being involved in this case, confronting the Generals with these terrible facts—that's the best possible therapy a torture survivor could have."

Juan Romagoza, Statement, *at* http://www.cja.org/article.php?list&type=251.

Moreover, *amici curiae* understand their role as seeking justice not simply in their personal capacity, but also on behalf of loved ones and all those who were killed or otherwise brutalized and who have been unable to pursue their day in court. Clinicians have noted that survivors pursuing legal action against their perpetrators may find meaning in their experience, a response Professor of Psychiatry Judith Herman has labeled a "survivor mission." Herman, *supra* at 207-11. Carlos Mauricio, who filed suit with *amicus* Dr. Romagoza, felt he testified both for himself but also for those who could not:

> To close the seal of my healing, I needed to talk in front of a jury and tell them my story . . . How many were able to confront the Generals? Very few. They couldn't because they were killed under torture, or they didn't want to . . . [I]n a way, I was the spokesperson for those who for whatever reason, couldn't come.

Rona Marech, *A Survivor's Victory Salvadoran Torturers are Found Guilty,* S.F. CHRON., Aug. 19, 2002, at B1. Similarly, *amicus* Wiwa has referred to his litigation experience as a "communal exorcism." Jad Mouawad, Oil Industry Braces for Trial on Rights Abuses, N.Y. TIMES May 21, 2009 *available at* http://www.nytimes.com/2009/05/22/business/global/22shell.html?ref=kensarowiwa.

3. *ATS and TVPA lawsuits vindicate the precise harm suffered by human rights victims.*

ATS and TVPA lawsuits serve as important vehicles for the vindication of the precise harms suffered by human rights victims. Lawsuits alleging ordinary torts, even if ostensibly similar in nature to

the crimes suffered, do not adequately address the harms suffered by human rights victims.

Victims should not be forced to diminish the realities of their suffering by pursuing claims that do not fully acknowledge the harm inflicted on them. An extrajudicial killing is simply not the same as a wrongful death. *See, e.g., Xuncax v. Gramajo*, 866 F. Supp. 162, 183 (D. Mass. 1995) (finding that municipal tort law is an "inadequate placeholder" for the "grave" wrongs meant to be addressed under § 1350, and that it would be inappropriate to reduce claims of torture and summary execution to "garden-variety municipal tort[s].").

Furthermore, the United Nations Committee Against Torture has found that lesser charges are inadequate substitutes for penalizing human rights crimes as defined in international law. Consequently, the Committee Against Torture has stressed that it is important to provide a specific remedy for torture *qua* torture:

> "The Committee recognizes that most States parties identify or define certain conduct as ill-treatment in their criminal codes. In comparison to torture, ill-treatment may differ in the severity of pain and suffering and does not require proof of impermissible purposes. The Committee emphasizes that it would be *a violation of the Convention* to prosecute conduct solely as ill-treatment where the elements of torture are also present."

Comm. Against Torture, *General Comment 2, Implementation of Article 2 by State Parties*, ¶9, U.N. Doc CAT/C/GC/2 (Jan. 24, 2008) (emphasis added).

The Committee Against Torture has justified the Convention's requirement for specific domestic legislation against human rights crimes because of the need to strengthen and promote prohibitions against human rights crimes, "naming and defining this crime will promote the Convention's aim, inter alia, by alerting everyone, including perpetrators, victims, and the public, to the special gravity of the crime of torture." *Id.*

Amici curiae submit that there is a "special gravity" associated with human rights crimes. For example, while an ordinary criminal may kidnap, he seldom has reason, or opportunity, to deny knowledge of the victim's whereabouts to inquiring family members. By contrast, family members seeking someone who has vanished often turn first to state actors, such as the police, creating an opportunity for the denial that turns kidnapping by the state into disappearance. *See, e.g., Forti v. Suarez-Mason*, 694 F. Supp. 707, 710-11 (N.D. Cal. 1988) (stating elements of a disappearance claim under the ATS). The denial by the state, in and of itself, engenders a distinct harm. This was recognized by the U.N. General Assembly in 1978 when it passed the U.N. Resolution on Disappeared Persons in part because of a concern about the "persistent refusal of [competent] authorities . . . to acknowledge that they hold such persons in their custody." U.N. Resolution on Disappeared Persons, G.A. Res. 33/173, U.N. GAOR, 33rd Sess., Supp. No. 45, U.N. Doc. A/RES/33/173, at 158 (Dec. 20, 1978).

Simply put, ordinary tort law suits are not adequate substitutes for ATS and TVPA claims.

CONCLUSION

To ensure that all survivors of human rights abuses continue to have the opportunity to seek redress in to U.S. courts, this Court should hold that corporations and organizations are subject to suit under the ATS and TVPA.

Respectfully submitted,

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APPENDIX

APPENDIX

LIST OF *AMICI CURIAE*

Dr. Juan Romagoza Arce was working as a country doctor for the rural poor in El Salvador in 1980 when he was detained and brutally tortured for 22 days at the National Guard Headquarters. After his release, he fled to the United States and was granted political asylum in 1983. In 2000, he and two other plaintiffs filed a lawsuit, under the ATS and the TVPA, against Generals Carlos Eugenio Vides Casanova and José Guillermo García. A jury found the Generals liable for Dr. Romagoza's torture under the doctrine of command responsibility. Dr. Romagoza recently returned to El Salvador, where he founded a community health clinic in Usultán as well as El Centro Romero, a home for impoverished persons living with HIV. In the fall of 2009, he was appointed Coordinator of the Basic Integral Health System of the Department of Usulután.

Cecilia Santos Moran was a mathematics student at the National University of El Salvador and an employee in the Salvadoran Ministry of Education when she was arrested at a shopping center in San Salvador in September 1980. Ms. Santos was tortured at the National Police Headquarters and then detained for three years without a fair hearing. She came to the United States in 1983 and later filed a lawsuit, under the ATS and TVPA, against Colonel Nicolás Carranza, former Vice Minister of Defense. A jury found Colonel Carranza liable, under the doctrine of command responsibility, for the torture suffered by Santos. She now lives in New York where she is the director of the Centro Salvadoreño, an organization that encourages socioeconomic

and cultural progress among Latino immigrant communities.

Ken Wiwa is a journalist and award-winning author. His book, *In the Shadow of a Saint*, is a memoir of his father, Ken Saro-Wiwa, an author and environmental activist, who, in 1995, was hanged after a sham trial in Port Harcourt, Nigeria. In 1996, Wiwa filed a lawsuit, under the ATS and TVPA, against Royal Dutch/Shell for, *inter alia*, directing and conspiring with the Nigerian military in the arbitrary arrest, detention, and extrajudicial killing of his father. In 2009, on the eve of trial, Royal Dutch/Shell agreed to settle the case for $15.5 million.

AMICUS CURIAE BRIEF

No. 11-88

In the Supreme Court of the United States

ASID MOHAMAD, ET AL.,

Petitioners,

—v.—

PALESTINIAN AUTHORITY AND PALESTINIAN LIBERATION ORGANIZATION,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF *AMICI CURIAE* LARRY BOWOTO ET AL. IN SUPPORT OF PETITIONERS

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STATEMENTS PURSUANT TO SUPREME COURT RULE 37

Amici respectfully submit this Brief in support of the Petitioners pursuant to Supreme Court Rule 37.[1] All parties to this proceeding have consented to filing.[2]

STATEMENT OF IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici curiae Larry Bowoto et al. are nineteen Nigerians who are the Petitioners in *Bowoto v. Chevron Corp.*, No. 10-1536 (pet'n for certiorari filed June 20, 2011).[3] Both the *Bowoto* Petition and the instant case present the question of whether entities may be held liable for extrajudicial killing under the Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 note.

Amici are members of the Ilaje ethnic group in

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[1] *Amici* affirm that no counsel for a party authored the brief in whole or in part and no person other than *amici* or their counsel made a monetary contribution to this brief.

[2] Consent letters have been filed with the Court by the parties.

[3] *Amici* are Larry Bowoto; Ola Oyinbo, on behalf of her deceased husband Bola Oyinbo and her minor children Bayo Oyinbo and Deji Oyinbo; Bassey Jeje; Margaret Irowarinun, Roseline Irowarinun, and Mary Irowarinun, individually and on behalf of their deceased husband Arolika Irowarinun; Bosuwo Sebi Irowarinun, Caleb Irowarinun, Orioye Laltu Irowarinun, Temilola Irowarinun, Adegorye Oloruntimjehum Irowarinun, Aminora James Irowarinun, Eniesoro Irowarinun, Gbenga Irowarinun, Ibimisan Irowarinun, Monotutegha Irowarinun, and Olamisbode Irowarinun, individually and on behalf of their deceased father Arolika Irowarinun.

the Niger Delta. In the *Bowoto* case, *amici* alleged that they and their deceased relatives were subjected to torture, extrajudicial killing, and other abuses by Nigerian security forces operating on behalf of Chevron Corporation and its subsidiaries. *Amici* Larry Bowoto and Bassey Jeje, together with decedents Bola Oyinbo and Arolika Irowarinun, were part of a group of protestors who occupied the Parabe Platform, an offshore facility operated by Chevron subsidiary Chevron Nigeria Limited (CNL). Several days into the protest, CNL called in Nigerian government security forces, who shot multiple protestors and killed two, including Irowarinun.

As detailed in the *Bowoto* Petition, the district court in that case dismissed claims brought by *amici* under the TVPA, ruling that corporations could not be held liable under that statute. That decision was affirmed by the Ninth Circuit. *Bowoto v. Chevron Corp.*, 621 F.3d 1116, 1126–28 (9th Cir. 2010).

Because the *Bowoto* Petition may be decided by the instant case, *amici* demonstrably have an interest in the outcome here. *Amici* have also briefed the issue of entity liability under the TVPA on five occasions, and their views may be of some assistance to the Court.

SUMMARY OF THE ARGUMENT

The Torture Victim Protection Act allows claims against legal entities, including corporations, for torture and extrajudicial killing. The TVPA's use of the term "individual" to describe defendants was intended only to exclude foreign states, not corporations or organizations.

The plain meaning of the term "individual"

encompasses legal entities. In ordinary usage "individual" is not indicative of human beings, but refers to any single entity. For over 150 years, courts have found that "individual" may include corporations, and against this background there should be no presumption that "individual" generally only refers to natural persons.

Moreover, the legislative history of the TVPA confirms that "individual" was not chosen to exclude corporations or organizations. The committee reports accompanying the enacted TVPA are abundantly clear that Congress deliberately chose the term "individual" to describe defendants in order to exclude foreign states who might otherwise be included under the term "person." Until this point, Congress had used the terms "individual" and "person" interchangeably throughout the legislative history of the TVPA. Although one member of Congress suggested his intent to exclude corporations in a committee markup four years before the TVPA was passed, this remark is not properly considered legislative history and cannot be considered indicative of Congressional intent.

Nor does including legal entities under the term "individual" create inconsistencies. Congress did use the term "individual" to describe torture victims as well as torturers, but this type of usage is common throughout the U.S. Code. The criminal torture statute, for example, likewise uses the term "person" to describe both torturer and torture victim, and there is no dispute that corporations and other legal entities can be prosecuted under that statute.

Congress' intent in passing the TVPA would be frustrated if legal entities were excluded from

liability. A primary stated goal of the TVPA was to expand the remedies for human rights abuses available under the Alien Tort Statute (ATS), 28 U.S.C. § 1350, by giving U.S. citizens the right to sue for torture and extrajudicial killing. At the time, Congress understood that legal entities could be sued under the ATS. To disallow similar suits by U.S. citizens would be an absurd result, unintended by Congress. In fact, Congress was aware of ATS suits against both foreign states and legal entities, but expressly chose only to exclude foreign states from the TVPA's reach.

Congress also intended the TVPA to ensure that torturers were held accountable for their acts and that victims had access to civil remedies. In this context, it would make no sense to exclude corporate and organizational authors of torture from liability. As this Court has noted in other cases, if the corporate treasury benefits from wrongful activity, the fruits of such violations should not be shielded from liability.

Given the ordinary meaning of the term "individual," Congress' stated reason for choosing the term, and the overall context and purpose of the TVPA, legal entities are liable for torture and extrajudicial killing under this statute.

ARGUMENT

I. The word "individual," by its plain meaning and its usage in the legislative history of the TVPA, encompasses legal entities such as corporations.

Amici submit that the plain meaning of the term "individual" does not exclude legal entities such as

organizations and corporations. The ordinary usage of this term does not connote human beings as opposed to entities. Moreover, it is generally acknowledged that the term "person" includes legal entities, and the term "individual" is certainly no more indicative of being limited to human beings than the term "person." Indeed, Congress used the terms "person" and "individual" interchangeably throughout the legislative history of the TVPA, belying any purported intent for the term "individual" to apply to a more restricted set of defendants.

A. The plain meaning of the word "individual" includes entities.

The term "individual," by its plain meaning, includes corporations. In *Clinton v. City of New York*, 524 U.S. 417 (1998), this Court held that, in the context of the Line Item Veto Act, the term "individual" is synonymous with "person" and encompasses corporations and other entities. *Id.* at 428 & n.13 (citing Webster's Third New Int'l Dictionary 1152, 1686 (1986)). The Court found that "Congress undoubtedly intended the word 'individual' to be construed as synonymous with the word 'person.'" *Id.* at 428–29 (concluding "[t]here is no plausible reason why Congress would have intended" to exclude corporations from the definition of "individual").

As *Clinton* found, the inclusion of legal entities is supported by the ordinary, dictionary definition of the word "individual." For example, the Random House Webster's Dictionary includes four general

definitions of the word "individual":

> 1. a single human being, as distinguished from a group.
>
> 2. a person: *a strange individual.*
>
> 3. a distinct, indivisible entity; a single thing, being, instance, or item.
>
> 4. a group considered as a unit.

Random House Webster's Unabridged Dictionary 974 (2d ed. 2001).[4] Although the first definition refers to a "human being," it is in contradistinction to a *group* of human beings, not to a corporation, and the third and fourth definitions plainly encompass corporations and other entities. Furthermore, as this Court observed in *Clinton*, 524 U.S. at 428 n.13, the term "person" — which Congress undoubtedly often uses to include corporations — is also defined as "a human being." Random House Webster's Unabridged Dictionary 1445. Indeed, none of the general definitions of "person" suggests the inclusion of corporations; that definition is identified as peculiar to the law:

> 1. a human being, whether man, woman, or child: *The table seats four persons.*
>
> 2. a human being as distinguished from an animal or a thing. . . .
>
> 5. the actual self or individual personality of a human being: *You ought not to generalize, but*

---

[4] A fifth definition is expressly qualified as being particular to the field of biology, and a sixth is specific to playing cards.

to consider the person you are dealing with.

6. the body of a living human being, sometimes including the clothes being worn: *He had no money on his person.*

7. the body in its external aspect: an attractive person to look at.

8. a character, part, or role, as in a play or story.

9. an individual of distinction or importance.

10. a person not entitled to social recognition or respect.

11. *Law.* a human being (**natural person**) or a group of human beings, a corporation, a partnership, an estate, or other legal entity (**artificial person** or **juristic person**) recognized by law as having rights and duties.

Id. Thus the ordinary meaning of "individual" is at least as, if not more, suggestive of legal entities than the ordinary meaning of "person."

Certainly, the term "person" is often used in the law to encompass legal persons and natural persons alike. But the expansive legal usage of "person" does not entail any restrictiveness for the usage of "individual." As the Ninth Circuit has noted, the term "individual" is not "a legal term of art that applies only to natural persons. . . . '[I]ndividual' as a general legal term does not exclude corporations[.]" *United States v. Middleton*, 231 F.3d 1207, 1210 (9th Cir. 2000).

In fact, this Court's holding in *Clinton* — that the

term "individual" may include legal entities — is situated in a long line of similar decisions. In 1849, the Supreme Court of Mississippi determined that a statute taxing loans made by "individuals" applied to banks and other corporations. *Bank of United States v. State*, 20 Miss. 456 (1849). The court observed that "the term individual, when used in a general sense, may comprehend a corporation." *id.* at 459, and that although the term "may be, and often is used, in contradistinction to banks or corporations . . . there is no necessary and invariable opposition of ideas in the term itself." *id.* at 460. The Supreme Court of Ohio similarly held that "[t]he word 'individual' . . . . embraces artificial or corporate persons as well as natural." *State ex rel. Am. Union Tel. Co. v. Bell Tel. Co.*, 36 Ohio St. 296, 310 (1880). Thus, to exclude corporations from the ambit of "individuals" requires a legalistic gloss on its meaning to provide a more restrictive interpretation than is inherent in the word.

Although some courts have, in some contexts, found the word "individual" to exclude legal entities, the line of cases coming to the opposite conclusion continues to today, in both state and federal courts. *See, e.g., United States v. Middleton*, 231 F.3d at 1212–13 (concluding that 18 U.S.C. § 1030, which criminalizes acts that damage computers and cause losses of $5,000 to "one or more individuals," applies to protect corporate-owned computers); *Cruze v. Nat'l Psychiatric Servs., Inc.*, 105 Cal. App. 4th 48, 55 (2003) (noting that "the rule seems to be that the word 'individual' is broad enough to embrace corporations and partnerships, and that where the context does not indicate otherwise, the word includes corporations" (internal quotation marks

omitted)); *Georgetown College, Inc. v. Webb*, 313 Ky. 25, 28 (1950) (same); *Shively v. Belleville Twp. High Sch. Dist. No. 201*, 329 Ill. App. 3d 1156, 1165–66 (2002) (affirming decision that "the term 'individuals' as used in section 10-20.21(i) includes corporations" because drawing distinction between "individuals doing business as sole proprietorships" and "those doing business as corporations" would be "absurd"); *Morgan v. Galilean Health Enters., Inc.*, 1998 OK 130, *8 n.16 (Okla. 1998) ("The word 'individual' includes corporations. . . . Its scope is broad enough to include corporations."); *Community Corp. v. Atlantic Bus. & Community Dev. Corp.*, 901 F.2d 325, 328–29 (3d Cir. 1990) ("individual" can encompass corporate debtor); *Budget Serv. Co. v. Better Homes of Va. Inc.*, 804 F.2d 289, 292 (4th Cir. 1986) (same); *Tenngasco Gas Gathering Co. v. Fischer*, 653 S.W.2d 469, 476 (Tex. Ct. App. 1983) (concluding that "'individuals' includes corporations" in a statute specifying to whom natural gas may be sold); *United States v. Badische & Co.*, 3 Cust. Ct. 528, 530 (1913) (noting that "numerous decisions have been given . . . in which the word 'individual' used in the statute has been held to include corporations and partnerships").

Courts, including this Court, have been ruling for over 150 years that the term "individual" may include legal entities. There should therefore be no presumption that "individual" only applies to human beings.

B. The legislative history indicates that, except for the stated reason to exclude foreign states, Congress generally used the term "individual" interchangeably with the term "person."

The legislative history of the TVPA further indicates that the statute was not intended to exclude corporations. As Petitioners note, Congress explained exactly why it used the term "individual" instead of "person" to describe the defendant: in order to exclude foreign states. Petitioners' Br. at 43–46. Apart from this usage choice, throughout the legislative history of the TVPA, Congress used the terms "individual" and "person" interchangeably, demonstrating that any possible restrictive meaning of "individual" beyond that specifically mentioned in the legislative history was not intended by Congress.

1. The TVPA was introduced in both houses in the 102nd Congress. The House bill, H.R. 2092, used the term "individual." *see* Torture Victim Protection Act of 1991, H.R. 2092, 102nd Cong., Torture Victim Protection Act of 1991, § 2(a) (as introduced Apr. 24, 1991); while the Senate bill, S. 313, used the term "person." *See* Torture Victim Protection Act of 1991, S. 313, 102nd Cong., Torture Victim Protection Act of 1991, § 2(a) (as introduced Jan. 31, 1991). The Senate then struck out the original language of S. 313 and replaced it with language almost identical to H.R. 2092, the bill that eventually became law. *See* Torture Victim Protection Act of 1991, S. 313, 102nd Cong., Torture Victim Protection Act of 1991 (as reported in Senate Nov. 26, 1991). The Senate Judiciary Committee's report on S. 313 explains that the term "individual" was used in order to avoid

conflict with the Foreign Sovereign Immunities Act:

> The legislation uses the term "individual" to make crystal clear that foreign states or their entities cannot be sued under this bill under any circumstances: only individuals may be sued. Consequently, the TVPA is not meant to override the Foreign Sovereign Immunities Act (FSIA) of 1976[.]

S. Rep. No. 102-249 at 7. This language is mirrored in House Judiciary Committee's report on H.R. 2092: "Only 'individuals,' not foreign states, can be sued under the bill." H.R. Rep. No. 102-367 at 4. Neither report suggests any intent to exclude corporations, despite the fact that Congress was aware that legal persons had been sued for torture under the ATS. *See infra* Part II(A).

These reports should remove any doubt about Congress' understanding of the word "individual." To the extent that Congress deliberately chose the term "individual" to apply a more restrictive meaning than "person," it did so in order to exclude foreign states, not corporations.

2. Prior to the final passage of the TVPA, when Congress chose "individual" to exclude foreign states, the terms "individual" and "person" were generally used interchangeably in the TVPA's four-year legislative history. The original committee report on the TVPA in the 100th Congress noted that the bill would provide liability for "[a]ny person who . . . subjects another to torture." H.R. Rep. No. 100-693 at 2; *see also id.* at 3. When the TVPA was reintroduced in the 101st Congress, and again

reported out of committee in the House, the committee report again used the terms "person" and "individual" interchangeably. *See* H.R. Rep. No. 101-55 at 1 (stating that the TVPA would provide "a civil action for recovery from persons engaging in torture," then stating that the TVPA would "provide a Federal cause of action against any individual" who tortures another).

In the 102nd Congress, the House report on the final version of the TVPA continued to mix the terms, stating that the statute authorizes suits against "any individual who . . . subjects a *person* to torture." H.R. Rep. No. 102-367 at 4 (emphasis added). The Senate Report did the same. *See, e.g.*, S. Rep. No. 102-249 at 8–9 ("The legislation is limited to lawsuits against persons who ordered, abetted, or assisted in the torture."). The committee reports do not suggest that, aside from the specified reason for choosing "individual" to describe a TVPA defendant, Congress intended, or even was aware of, any other difference between its usage of "individual" and "person."

3. As Petitioners note, Respondents have pointed to a statement by one member of Congress in a subcommittee markup four years prior to the enactment of the TVPA in order to suggest that the term "individual" was intended to exclude corporations. Br. in Opp'n at 20 n.3. In the opinion below, however, the D.C. Circuit wisely avoided reliance on this statement; as Petitioners correctly note, this statement is not legislative history and "is of no moment." Petitioners' Br. at 44. And even if it were legislative history, it dates from two Congresses prior to the passage of the TVPA.

Reliance on the exchange in the subcommittee markup would be error. In *California v. American Stores Co.*, 495 U.S. 271 (1990), this Court reversed a decision by the Ninth Circuit that relied heavily on statements made in a subcommittee hearing that were not included in the bill's legislative history. The issue in *California* was whether injunctive relief under the Clayton Act included divestiture when a suit was brought by private citizens rather than the U.S. government. The Ninth Circuit was persuaded by two statements made in a hearing before a subcommittee of the House Judiciary Committee, one of which explicitly said, "We did not intend . . . to give the individual the same power to bring a suit to dissolve the corporation that the government has," and ruled that the Act did allow divestiture. *Id.* at 287. This Court reversed, stating that the Ninth Circuit improperly relied on these statements because they were not confirmed elsewhere in the legislative history. *Id.* at 294.

When the TVPA passed in the 102nd Congress, there was no indication of any intent to exclude corporations in either committee report. Instead, as noted above, the reports provided a different explanation for the choice of "individual." The 1988 markup cited by Respondents is not legislative history that can be considered in interpreting the final statute. There is no evidence "that the Senators and Representatives who voted for the [bill] when [it] reached the floor knew of" this exchange, and the "subsequent legislative history does not so much as hint" at this conversation. *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 273 n.32 (1979). While committee reports represent an "exposition" of legislative intent, statements by

individual members do not. *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 474 (1921). There is no indication that the 100th Congress, beyond the members present at the markup, was aware of the discussion that Respondents cite — let alone that the members of the 102nd Congress had any inkling of what had transpired in a subcommittee markup four years before.

C. Including legal entities among "individuals" does not create inconsistent results.

Respondents have suggested that, because the TVPA uses the term individual to describe both the torturer and the torture victim, including legal entities in this term would necessitate inconsistent usage. Because legal entities cannot be torture victims, Respondents argue, they cannot be torturers either. Br. in Opp'n at 18–19.

Amici submit that Congress' usage of the term "individual" was not inconsistent, and that similar usage is found throughout the U.S. Code. Congress was simply using a term whose full significance may not be relevant in every instance.

The U.S. criminal torture statute uses "person" in precisely the same way that the TVPA uses the term "individual," referring to both the torturer and victim. *See* 18 U.S.C. § 2340(1). By Respondents' logic, this statute uses the word "person" inconsistently because it implies that legal entities, which are generally included within the term "persons," can be tortured. By the same logic, one would think that Congress believes that corporations can be kidnaped, *see* 18 U.S.C. § 1201(a), taken

hostage, *see id.* § 1203(a), sold into slavery, *see id.* § 1584(a), or made to commit forced labor, *see id.* § 1589(a), in addition to being tortured.

Amici do not believe that any of these statutes, including the criminal torture statute and the TVPA, presents a problem of inconsistent usage. While Congress may use words consistently, not every member of the set covered by a word is relevant to every use of the word. A word such as "individual" or "person" may include artificial entities, even though some uses of the word only apply to human beings. "Most words have different shades of meaning and consequently may be variously construed, not only when they occur in different statutes, but when used more than once in the same statute or even in the same section." *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932).

II. The context and purpose of the TVPA demonstrate Congressional intent to include legal entities as possible defendants.

The context and purpose of the TVPA suggest that the term "individual" should be read to include legal entities, including corporations. Congress' purpose in passing the TVPA was to enhance remedies against violators of human rights, and especially to provide such remedies to U.S. citizens who could not bring ATS claims.

A. Congress intended the TVPA to provide remedies to U.S. citizens who could not sue under the Alien Tort Statute. Although Congress was aware of ATS suits against both foreign states and legal entities, it only chose to exclude foreign states from the TVPA's reach.

As Petitioners note, Congress intended that the TVPA would provide a remedy for torture and extrajudicial killing to U.S. citizens who could not bring such claims under the ATS. Petitioners' Br. at 50. When it passed the TVPA, Congress understood that both organizational defendants and foreign states had been sued for torture under the ATS. Nonetheless, the legislative history indicates that Congress only intended to exclude the latter class of defendants from TVPA liability. Congress did not intend for U.S. citizens to be excluded from remedies available to aliens against legal entities.

The legislative history of the TVPA specifically indicates that a motivating factor for passing the bill was Judge Bork's opinion in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), which argued that torture claims could not be brought under the ATS. *See* H.R. Rep. No. 102-367 at 4; S. Rep. No. 102-249 at 4. There were two types of defendants in *Tel-Oren*. Congress was paying attention to who had been sued: the lead defendant was the Libyan government, and Congress made sure to exclude foreign governments from the TVPA. The remaining defendants, however, were all legal entities. *See* 726 F.2d at 775 (defendants on appeal included "the Palestine Liberation Organization, the Palestine Information Office, [and] the National

Association of Arab Americans"). Despite familiarity with *Tel-Oren*, there is no indication that Congress was concerned about legal entities as defendants.[5]

Thus, despite its awareness that legal entities had been and could be sued under the ATS, Congress gave no indication that such suits should be disallowed under the TVPA. Congress' general statement of intent to provide similar remedies to U.S. citizens as those available to aliens entails the conclusion that the TVPA likewise allows suits against legal entities.

B. The overall purpose of the TVPA indicates that corporations should be included.

Statutory purpose is an important factor in evaluating Congress' intent. For example, this Court in *Clinton* examined the purpose behind the relevant portion of the Line Item Veto Act, which it determined was to allow "a prompt and authoritative judicial determination of the constitutionality of the Act." 524 U.S. at 428–29. The Court then concluded that Congress would not have intended to exclude

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[5] Congress' understanding that legal entities could be sued under the ATS was correct, but, more importantly for present purposes, Congress had no reason to believe that legal entities could not be sued. No Circuit questioned that legal entities were subject to ATS liability until the Second Circuit's split decision in *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), *certiorari granted*, 181 L. Ed. 2d 29, 80 U.S.L.W. 3237 (Oct. 17, 2011), which remains the only case so holding. As Judge Posner noted in his recent opinion in *Flomo v. Firestone Natural Rubber Co., LLC*, 643 F.3d 1013 (7th Cir. 2011), the *Kiobel* decision is an "outlier," based on incorrect factual premises and faulty legal reasoning. *Id.* at 1017–21.

corporations from the definition of "individual." because to do so would undermine the purpose of expediting review of the statute at issue. *Id.* at 429.

This approach of examining the purpose of the statutory scheme is consistent with *United States v. A&P Trucking Co.*, 358 U.S. 121 (1958). There, this Court considered whether the term "whoever" applied to partnerships, despite their general lack of separate legal personality. Because the statute at issue was intended to "make[] regulations . . . for the transportation of dangerous articles binding on *all* common carriers," the Court noted that "the conclusion is not lightly to be reached that Congress intended that some carriers should not be subject to the full gamut of sanctions provided . . . merely because of the form under which they were organized to do business." *Id.* at 124. The Court concluded:

> The business entity cannot be left free to break the law merely because its owners . . . do not personally participate in the infraction. The treasury of the business may not with impunity obtain the fruits of violations which are committed knowingly by agents of the entity in the scope of their employment.

Id. at 126. This conclusion is consistent with a long line of Supreme Court cases, most recently *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010), holding that corporations have similar rights as natural persons. *See, e.g., First Nat'l Bank v. Bellotti*, 435 U.S. 765, 780 n.15 (1978).

This approach dictates that the term "individuals" in the TVPA likewise encompasses

corporations. Congress' overall purpose in passing the TVPA was to fulfill its obligation "to adopt measures to ensure that torturers are held legally accountable for their acts" by providing "means of civil redress to victims of torture." H.R. Rep. No. 102-367 at 3.

As in *Clinton*, Congress' purpose in enacting the TVPA is antithetical to excluding corporations from liability. Congress would not have intended to create a gap in this redress scheme for abuses perpetrated by corporations — to allow "the treasury of the business" to "obtain the fruits" of torture by its agents with impunity. *A&P Trucking*, 358 U.S. at 126. Nor would Congress want U.S. citizens to be unable to sue corporations when, as it then understood, aliens could do so.

CONCLUSION

For all these reasons, legal entities, including corporations, may be held liable for torture and extrajudicial killing under the TVPA.

DATED: December 21, 2011

Respectfully Submitted.

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AMICUS CURIAE BRIEF

No. 11-88

FILED
FEB - 1 2012

In The
Supreme Court of the United States

ASID MOHAMAD, et al.,

Petitioners,

v.

PALESTINIAN AUTHORITY, et al.,

Respondents.

On A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF KBR, INC., AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the Torture Victim Protection Act, 28 U.S.C. § 1350 note § 2(a), permits actions against defendants which are not natural persons.

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INTEREST OF *AMICUS CURIAE*[1]

With more than 28,000 employees in 45 countries on five continents, *amicus curiae* KBR, Inc. ("KBR") is a global engineering, construction, and services company supporting the energy, hydrocarbon, government services, minerals, civil infrastructure, power, and industrial sectors. As a matter of policy and conviction, KBR unequivocally rejects and condemns the practices of torture and extra-judicial killing targeted by the Torture Victim Protection Act, 28 U.S.C. § 1350 note § 2 ("TVPA") and fully supports efforts to protect the human rights of all people. To that end, KBR's Code of Business Conduct unambiguously requires the Company and its employees, in every instance, to treat all persons with dignity and respect and to comply with all applicable governmental laws, rules, and regulations. The Code also establishes clear reporting procedures to ensure consistent accountability and compliance with these and other requirements.

KBR has a compelling interest in the Court's clarifying the proper objects of lawsuits alleging violations of international law and human rights norms. Despite its record of leadership and commitment to ethical business conduct, KBR is currently defending

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* certifies that no counsel for any party authored this brief in whole or in part and that no person or entity other than *amicus* made a monetary contribution intended to fund the brief's preparation or submission. Letters from the parties consenting to the filing of this brief are filed with the Clerk.

against claims of alleged violations of human rights cognizable under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, Trafficking Victims Protection Reauthorization Act, 18 U.S.C. § 1595, and Racketeering Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962(c). *See Adhikari v. Dauod & Partners*, Case No. 09-cv-1237 (S.D. Tex.). These claims allege conduct occurring outside of the United States, principally by entities that are not party to U.S. litigation and with whom KBR had no business relationship but whose behavior the plaintiffs allege should be imputed to KBR. The problems presented by this litigation demonstrate precisely why "the customary international law of human rights has remained focused not on abstract entities but on the individual men and women who have committed international crimes." *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 119 (2d Cir. 2010).

The Court has recognized the close relationship between the TVPA and the ATS by ordering the instant case be argued in tandem with *Kiobel v. Royal Dutch Petroleum*, No. 10-1491. A ruling finding that corporate defendants may not be subject to the TVPA, consistent with the "'specific, universal, and obligatory'" norms of customary international law, *Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004) (quoting *In re Estate of Marcos Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994)), would vindicate Congress' purpose of allowing victims of state-sponsored torture to vindicate their rights through a U.S. enforcement regime, while preventing the U.S. courts

from becoming an all-purpose forum for private torts alleged to be suffered at the hands of multinational corporations. It would also provide certainty to global service providers like KBR, as well as other American firms doing business abroad.

Accordingly, KBR offers this brief as *amicus curiae* to discuss the plain meaning of the TVPA and the bedrock principles of customary international law that Congress observed in enacting it.[2]

SUMMARY OF THE ARGUMENT

The plain text of the Torture Victim Protection Act reflects and should be interpreted in light of the well-established norms of customary international law that recognize the liability of state officials and natural persons who work in concert with them, but not private corporations.

By employing the word "individual," Congress made unequivocally clear its intention that the TVPA would recognize only natural persons as defendants, and not corporations. The statutory context, mark-up history, and committee reports demonstrate that this was a considered choice for a statute that received extensive debate and scrutiny over several

[2] Though supporting the decision below and its reasoning, *amicus* takes no position on Respondents' juristic status as corporations, which was not contested below and is not properly before this Court.

Congresses. That, in one instance, this Court has bowed to overwhelming contextual evidence which overturned the usual presumption that "individual" means "natural person" does not relieve Petitioners of the burden of presenting such evidence in this case to support their proffered interpretation of the TVPA – a burden that they do not and cannot carry.

Moreover, Congress enacted the TVPA to codify certain aspects of customary international law in response to a judicial opinion questioning the availability of a private right of action for torture victims under the Alien Tort Statute. Consistent with the TVPA's text, history and practice unanimously confirm that this body of law does not recognize the liability of non-state collective entities such as corporations for the type of conduct covered by the TVPA. In this way, customary international law and the TVPA are mutually reinforcing with respect to the scope of liability for human-rights violations.

ARGUMENT

I. The Plain Text of the TVPA Precludes Collective Entities as Defendants

By using the word "individual" to describe who may commit an offense under the TVPA, Congress made clear its intention to exclude collective entities from liability, consistent with the clearly-established norms of customary international law.

First and foremost, an "individual" is, in common parlance, "a single human being[,] as contrasted with a social group or institution." *Webster's Third New International Dictionary* 1152 (1971); *Webster's Ninth New Collegiate Dictionary* 615 (1983) (identical). *Accord Oxford English Dictionary* (2011) ("A single human being"); *American Heritage Dictionary* (5th ed. 2011) ("A single human considered apart from a society or community."); *Black's Law Dictionary* (9th ed. 2010) ("Of or relating to a single person or thing, as opposed to a group."). Congress itself ascribed this same meaning to "individual" in the Dictionary Act, which, in defining "person" and "whoever," employs "individual" to refer to natural persons. 1 U.S.C. § 1. This plain meaning should prevail, consistent with the rule that, in the absence of a statutory definition, the Court "construe[s] a statutory term in accordance with its ordinary or natural meaning." *F.D.I.C. v. Meyer*, 510 U.S. 471, 476 (1994) (defining "cognizable").

Second, Congress specifically declined to employ either of two terms, "person" and "whoever," that it has defined to include, and regularly uses to reach, "corporations, companies, associations, firms, partnerships, societies, and joint stock companies." 1 U.S.C. § 1. When Congress has wished to extend liability to collective entities, "it had little trouble doing so." *Pinter v. Dahl*, 486 U.S. 622, 650 (1988); *see also Dole Food Co. v. Patrickson*, 538 U.S. 468, 476 (2003); *Central Bank of Denver v. First Interstate Bank*, 511 U.S. 164, 176-77 (1994). Here, as to defendants of TVPA claims, it did not.

Third, Congress's decision not to extend the TVPA to collective entities was a considered choice, not mere happenstance. In this regard, the first version of the TVPA, introduced in 1987, authorized claims against any "person" who subjected another to torture. *The Torture Victim Protection Act: Hearing and Markup before the H. Comm. on Foreign Affairs on H.R. 1417*, 100th Cong. 82, 85 (1988). In markup, however, the House Foreign Affairs Committee adopted an amendment which substituted "individual" for "person" to "make it clear [Congress was] applying it [the Act] to individuals and not to corporations." *Id.*; *see Bowoto v. Chevron Corp.*, 621 F.3d 1116, 1127-28 (9th Cir. 2010) (discussing legislative history). This formulation was carried through to the version of the legislation passed into law in 1992, by a Congress cognizant of that specific choice of language. *See* S. Rep. No. 102-249, at 6 (1991) (explaining that "individual" was used "to make crystal clear that foreign states or their entities cannot be sued under this bill under any circumstances: only individuals may be sued"); H.R. Rep. No. 102-367 (1991), reprinted in 1992 U.S.C.C.A.N. 84, 87 (similar).

Fourth, and conspicuously, the TVPA does allow that a "person," as opposed to merely an "individual," "who may be a claimant in an action for wrongful death" may also be claimant in a TVPA action for extra-judicial killing. 28 U.S.C. § 1350 note § 2(a)(2). This distinct usage – the only instance in the TVPA where Congress employed a term other than "individual" – bears practical significance, authorizing claims

by juristic persons, such as the decedent's estate. As the court below concluded, "this further supports the significance of the Congress having used 'individual' rather than 'person' to identify who may be sued under the TVPA." *Mohamad v. Rajoub*, 634 F.3d 604, 608 (D.C. Cir. 2011). In drafting this precise legislation, where Congress wished to address a broader class of "persons," it did so specifically by textual distinction. *See Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53, 63 (2006) (stating presumption that "Congress intended its different words to make a legal difference").

Fifth, Congress's use of the term "individual" to describe both victims and perpetrators of torture is not consistent with a reading of the term that includes collective entities. "A term appearing in several places in a statutory text is generally read the same way each time it appears." *Ratzlaf v. United States*, 510 U.S. 135, 143 (1994). This presumption is "at its most vigorous when a term is repeated within a given sentence." *Brown v. Gardner*, 513 U.S. 115, 118 (1994); *Reno v. Bossier Parish Sch. Bd.*, 528 U.S. 320, 329-30 (2000). So it is here. The TVPA's operative provision employs "individual" five times in a single sentence, four of which refer to a victim of torture or killing and one of which refers to the perpetrator. 28 U.S.C. § 1350 note § 2(a). But only a natural person, and not a collective entity, may be a victim of torture or extrajudicial killing, particularly as those offenses are

defined in the TVPA.[3] *Id.* § 3(a) (defining "extra-judicial killing"); § 3(b)(1) (defining "torture" as the infliction of "severe pain or suffering" in certain circumstances).

Petitioners identify no contextual markers that oppose or undermine the "vigorous" presumption that Congress spoke with consistency. It is not enough to simply observe that the presumption "'readily yields' whenever the word is 'employed in different parts of the act with different intent.'" Pet. Br. at 27 (quoting *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 595 (2004), in turn quoting *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1933)). Rather, as the non-truncated quotation from *Atlantic Cleaners* explains, there must be "such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent." 286 U.S. at 433. Unsupported by such variation in statutory context, Petitioners' conclusion that Congress's use of "individual" to mean a natural person "has no bearing," Pet. Br. 28, on that word's meaning elsewhere in the same sentence is less argument than *ipse dixit*. *Cf. Brown*, 513 U.S. at 118 ("Ambiguity is a creature not of definitional possibilities but of statutory context.").

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[3] Petitioners concede as much. *See* Pet. Br. at 28 (acknowledging this point as a "fact").

Sixth, and finally, the Court did not hold in *Clinton v. New York*, 524 U.S. 417 (1997), that the terms "individual" and "person" "can be construed synonymously in a statutory context." Pet. Br. at 20. In *Clinton*, the Court recognized that "'person' often has a broader meaning in the law" than "individual," *id.* at 428 n.13 (citing Dictionary Act, 1 U.S.C. § 1), but it held that the expedited review provision of the Line-Item Veto Act "evidences an unmistakable congressional interest in a prompt and authoritative judicial determination of the constitutionality of the Act," such that there was "no plausible reason" why Congress would have denied expedited review to corporate entities by use of the word "individuals." *Id.* at 428-29. *Clinton* is simply one of those "'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters'" and in which, accordingly, "the intention of the drafters, rather than the strict language, controls." *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989) (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)). It is the exception, not the rule. And for the exception to apply, there must be some evidence of discord between strict language and congressional intent. *See* 524 U.S. at 429 (quoting *Griffin*, *supra*).

Yet petitioners can identify none save the generalization that Congress sought "to provide victims with remedies for torture and extrajudicial killing." Pet. Br. at 38. Of course, "no legislation pursues its purposes at all costs," *Rodriguez v. United States*, 480

U.S. 522, 525-26 (1987), and the TVPA is replete with limitations on the statute's applicability: it applies only to those who operate "under actual or apparent authority, or cover of law"; it applies only to actions taken under authority of "a foreign nation"; and it requires that plaintiffs "exhaust[ ] adequate and available remedies in the place in which the conduct giving rise to the claim occurred." 28 U.S.C. § 1350 note § 2. That Congress legislated with a general purpose – one which the ordinary meaning of the statutory text fairly carries out – falls far short of the strict standard articulated in *Clinton*, *Ron Pair*, and *Griffin*. It cannot give the Court license to ignore ordinary meaning, and to vary the meaning of a term used multiple times *within a single sentence*, or the Court would have that license in every instance where Congress declined to carry a general purpose to its logical ends. In any case, as explained *infra*, maintaining consistency with the well-established norms of customary international law provided Congress a compelling reason to decline to extend liability to non-state collective entities.

II. The TVPA Reflects Customary International Law's Focus on the Acts of Natural Persons, as Recognized Under the Alien Tort Statute

The TVPA's focus on "individuals" as natural persons confirms and is consistent with those customs and usages of civilized nations that are sufficiently "specific, universal, and obligatory" as to constitute

customary international law. The settled norms of international law, as demonstrated through practice, reinforce the ordinary meaning of the statutory text, and that ordinary meaning, in turn, provides further confirmation of the substance of international law. The two are mutually supportive.

A. The TVPA Codifies Customary International Law

As a general matter, Congress "legislate[s] against a background of common-law . . . principles," *Astoria Fed. Sav. & Loan Assn. v. Solimino*, 501 U.S. 104, 108 (1991), and the Court has long enforced "the presumption that Congress intended to retain the substance of the common law," *Samantar v. Yousef*, 130 S.Ct. 2278, 2289 n.13 (2010). Accordingly, the Court reads statutes to "favor[] the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident," *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952), and will not presume that Congress intended the opposite, *Midlantic Nat'l Bank v. New Jersey Dep't of Envt'l Protection*, 474 U.S. 494, 501 (1986).

In particular, statutes "should not be interpreted to regulate foreign persons or conduct if that regulation would conflict with principles of international law." *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 815 (1993) (Scalia, J., dissenting). This is a corollary of the *Charming Betsy* canon, holding simply that Congress is generally presumed to exercise its powers

consistent, rather than in conflict, with international law. *Id.* Following this approach, the Court in *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 382-84 (1959), held that Jones Act jurisdiction did not extend to a foreign seaman's claims against his foreign employer for injuries that occurred while temporarily in U.S. waters. Though the question before the Court was statutory in nature, the "controlling considerations," where the statute did not speak directly to the question at hand, "are the interacting interests of the United States and of foreign countries" and, in particular, the well-established international norm recognizing the "interests of foreign nations in the regulation of their own ships and their own nationals." *Id.* at 383-84. *Accord Lauritzen v. Larsen*, 345 U.S. 571, 576 (1953) (recognizing that Congress had legislated "not on a clean slate, but as a postscript to a long series of enactments governing shipping," and had acted "with regard to a seasoned body of maritime law"); *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21-22 (1963) (interpreting National Labor Relations Act in harmony with "the well-established rule of international law that the law of the flag state ordinarily governs the internal affairs of a ship").

This canon unquestionably applies to the TVPA, and as more than a mere presumption as to Congress's intentions. In this regard, Congress enacted the TVPA "[t]o carry out obligations of the United States under the United Nations Charter and other international agreements pertaining to the protection

of human rights by establishing a civil action for recovery of damages from an individual who engages in torture or extrajudicial killing." Pub. L. No. 102-256, 106 Stat. 73, 73 (1992). The TVPA's operative provisions themselves incorporate international law. The statute's definition of "extrajudicial killing" encompasses killings "not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are *recognized as indispensable by civilized peoples*" and specifically exempts any execution "that, *under international law*, is lawfully carried out under the authority of a foreign nation." 28 U.S.C. § 1350 note § 3(a) (emphasis added). "Torture," meanwhile, parallels the definition contained in the United Nations Convention Against Torture ("CAT"), as clarified by the understandings included in the Senate's ratification of the Convention. *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 1(1), Dec. 10, 1984, S. Treaty Doc. No. 100-20 (1988), 1465 U.N.T.S. 85.

The detailed reports of the House and Senate committees responsible for the final legislation provide additional evidence of Congress's intention to codify existing customary international law. The report of the House Judiciary Committee explained, first, that "[t]he universal consensus condemning these practices [torture and summary execution] has assumed the status of customary international law" and, second, that the overriding purpose of the TVPA was to provide a means of enforcing that law, consistent with

the CAT. H.R. Rep. No. 102-367, at 85. The Senate Judiciary Committee's report echoed those points. S. Rep. No. 102-249, at 2.

Congress was driven to act, however, not by generalized concern, but by a specific court decision: Judge Bork's concurrence in *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 813 (D.C. Cir. 1984), which cast doubt on the existence of a private right of action for victims of torture and terrorism under the ATS. Endorsing the view that the ATS "gave Federal courts jurisdiction over allegations of torture since torture violates the 'law of nations,'" Congress enacted the TVPA to "establish an unambiguous basis for a cause of action that has been successfully maintained under an existing law." S. Rep. No. 102-249, at 3; *accord* H.R. Rep. No. 102-367, at 86 ("The TVPA would establish an unambiguous and modern basis for a cause of action that has been successfully maintained under an existing law, section 1350 of the Judiciary Act of 1789. . . ."). Its stated intention was not to deviate, in any way, from customary international law, but merely to codify it into a cause of action under U.S. law.

B. Customary International Law Precludes Corporate Liability for the Acts Covered by the TVPA

Congress's intention to codify customary international law in the TVPA therefore speaks directly to the scope of liability under the TVPA. As this Court

explained in *Sosa*, customary international law itself "extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual." 542 U.S. at 732 n.20; *see also id.* at 760 (Breyer, J., concurring) (explaining that, to obtain customary status, a "norm [of international law] must extend liability to the type of perpetrator (*e.g.*, a private actor) the plaintiff seeks to sue."). Accordingly, where a private collective entity cannot be a proper defendant under customary international law, it cannot be one under the TVPA.

For substantially the reasons explained by the Second Circuit in *Kiobel*, and confirmed by recent surveys of international practice, customary international law does not recognize the liability of private collective entities for the type of conduct covered by the TVPA.

First, customary international law has traditionally defined the rights and obligations only of sovereigns:

> Since the Law of Nations is based on the common consent of individual States, States are the principal subjects of International Law. This means that the Law of Nations is primarily a law for the international conduct of States, and not of their citizens. As a rule, the subjects of the rights and duties arising from the Law of Nations are States solely and exclusively.

1 *L. Oppenheim, International Law: A Treatise* 19 (H. Lauterpacht 8th ed. 1955). Historically, this general rule recognized only a narrow exception for the perpetrators of such offenses as piracy, individuals long deemed *hostis humani generis* ("enemies of mankind"). *See Tel-Oren*, 726 F.2d at 781 (Edwards, J., concurring) (quoting *Oppenheim, International Law* 609). This Court has recognized the specific and narrow scope of this exception, defined both by conduct and by the status of perpetrators. *Sosa*, 542 U.S. at 732 (discussing "historical antecedents"); *The Malek Adhel*, 43 U.S. 210, 232 (1844) (defining piracy under "the general law of nations"); *United States v. Klintock*, 18 U.S. 144, 151-52 (1820) (anti-piracy offense "ought not to be so construed as to extend to persons under the acknowledged authority of a foreign State"). In all other instances, customary international law governed only the relations of states.

Second, the easing of "[t]hese formal and rigid categories of traditional international law" is a relatively recent phenomenon and has only advanced so far. Consensus over the liability of natural persons under customary international law for torture, extrajudicial killing, and other human-rights offenses has developed, and continues to develop, at a gradual pace. This Court recognized as much in *Sosa* by its approving citation of Judge Edwards's scholarly concurrence in *Tel-Oren*. *Sosa*, 542 U.S. at 732 n.20. Judge Edwards identified the difficulty with identifying an unequivocal international law norm applicable to private parties. Answering that question

> would require this court to venture out of the comfortable realm of established international law . . . in which states are the actors. It would require an assessment of the extent to which international law imposes not only rights but also obligations on individuals. It would require a determination of where to draw a line between persons or groups who are or are not bound by dictates of international law, and what the groups look like. . . . As firmly established as is the core principle binding states to customary international obligations, these fringe areas are only gradually emerging and offer, as of now, no obvious stopping point.

Tel-Oren, 726 F.2d at 791 n.20 (Edwards, J., concurring). The "degree of 'codification or consensus,'" Judge Edwards concluded, "is simply too slight" to establish a binding norm of private liability. *Id.* (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964)). Where the Court's decision in *Sosa* cited authority suggesting that an international law norm applicable to private individuals (not even private collective entities) was sufficiently universal to be cognizable under the Alien Tort Statute, *see Kadic v. Karadzic*, 70 F.3d 232, 239-41 (1995), the legal norm was codified by treaty and clearly established in the aftermath of the Second World War, placing a strong "limit upon judicial recognition" of private claims premised on customary international law. *Sosa*, 542 U.S. at 732.

Third is the absence of any precedent in the practices of nations holding private collective entities liable for violations of norms such as torture. A current survey of international legal sources finds "embarrassingly little evidence of an international consensus (or even of international support) in favor of imposing liability on private corporations for general violations of customary international law." Julian Ku, *The Curious Case of Corporate Liability Under the Alien Tort Statute*, 51 Va. J. Int'l L. 353, 355 (2011). This holds true from the very dawn of modern private-actor liability. As Judge Korman explained in his *Khulumani* dissent, the London Charter, which created the International Military Tribunal at Nuremberg, did not confer jurisdiction over corporations, only over "persons who, . . . as individuals or as members of organizations," committed certain crimes. *Khulumani v. Barclay National Bank Ltd.*, 504 F.3d 254, 321-22 (2d Cir. 2007) (Korman, J., dissenting) (quoting Charter of the International Military Tribunal, art. 6, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279). Practice bore this out: no corporations were named as defendants at Nuremberg. *Id.* at 322; *see also Ku*, *supra*, at 379-81 (collecting primary sources); *id.* at 381 (quoting Nuremberg Tribunal opinion's rejection of corporate liability).[4]

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[4] The dissolution of I.G. Farben is not to the contrary. First, Farben was not, in fact, a defendant of the Nuremberg Tribunals. *See* 8 *Trials of War Criminals Before the Nuernberg Military Tribunals* 1153 (1948) ("Farben [ ] is not before the bar

(Continued on following page)

Subsequent practice is consistent in rejecting collective-entity liability. In 1953, for example, the Committee on International Legal Jurisdiction, charged to consider aspects of a proposed international criminal tribunal under the auspices of the United Nations, rejected jurisdiction over corporations on the ground that "it was undesirable to include so novel a principle as corporate criminal responsibility in the draft statute." *Report of the Committee on International Criminal Court Jurisdiction*, U.N. GAOR, 9th Sess., Supp. No. 12, U.N. Doc. A/2645 ¶85 (1954). As Judge Korman recounts, a similar proposal was rejected in negotiations for the Rome Statute, which established the present International Criminal Court, for three reasons:

> (1) "from a pragmatic point of view it was feared that the ICC would be faced with

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of this Tribunal and cannot be subjected to criminal penalties in these proceedings. . . . But corporations act through individuals and, under the conception of personal individual guilt to which previous reference has been made, the prosecution, to discharge the burden imposed upon it in this case, must establish by competent proof beyond a reasonable doubt that an individual defendant was either a participant in the illegal act or that, being aware thereof, he authorized or approved it."). Second, Farben's breakup was not a result of the application of international law, and did not occur as the result of any judicial process, but was a political action by the Allies. Control Council Law No. 9, Providing for the Seizure of Property Owned by I.G. Farbenindustrie and the Control thereof (Nov. 30, 1945). The preamble to this law states, quite clearly, its pragmatic purpose: "to insure that Germany will never again threaten her neighbors or the peace of the world. . . ." *Id.*

> tremendous evidentiary problems when prosecuting legal entities"; (2) "from a more normative-political point of view it was emphasized that the criminal liability of corporations is still rejected in many national legal orders, and international disparity which could not be brought in concord with the principle of complementarity"; and (3) "it was felt morally obtuse for States to insist on the criminal responsibility of all entities other than themselves."

Khulumani, 504 F.3d at 323 (Korman, J., dissenting) (quoting Albin Eser, *Individual Criminal Responsibility, in 1 Antonio Cassese et al., The Rome Statute of the International Criminal Court: A Commentary* 767, 778-79 (2002)); *see* Rome Statute of the International Criminal Court, art. 25(1), July 17, 1998, 2187 U.N.T.S. 90 (limiting jurisdiction to "natural persons").

Nor do the international criminal tribunals established by the United Nations Security Council to prosecute war crimes in the former territories of Yugoslavia or Rwanda recognize corporate liability. *See Ku*, *supra*, at 383 (quoting and discussing authorizing resolutions). And in practice, neither tribunal brought charges against any juristic person. *Id.* This is particularly significant because these tribunals, while fashioning their own procedural rules, were charged by the Security Council to apply existing substantive international law norms. *Id.* at 384.

Fourth, treaty law does not evidence or support corporate liability for violations of the customary

international law norms at issue. As Professor Ku explains, most treaty law is generally incapable of providing direct support for corporate liability: "Almost every treaty regime imposes liability indirectly by formally imposing an obligation on state parties to impose duties on private parties. Treaties cannot impose duties on private parties directly because private parties are not competent to make treaties under international law." *Ku*, *supra*, at 384. Accordingly, for example, the Convention Against Bribery of Foreign Government Officials does not regulate juristic persons directly, but requires, instead, that state parties do so. Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, art. 2, Dec. 17, 1997, 112 Stat. 3302 (1998), 37 I.L.M. 1; *see also* United Nations Convention Against Transnational Organized Crime art. 5(1)(b), Nov. 15, 2000, 2237 U.N.T.S. 319 (same approach).

Treaty law actually provides further evidence that private liability for violations of international norms concerning human rights is limited to natural persons. Whereas the Convention Against Bribery at least mentions juristic entities, the CAT does not even take that step; to the contrary, it strongly suggests that the offenses it defines may only be committed by natural persons. *See* CAT, arts. 6(1), 6(3) (referring to suspected perpetrators as "he" and "him"). Treaties addressing arguably analogous norms, such as genocide, similarly do not provide for the liability of juristic persons. *See* Convention on the Prevention and Punishment of the Crime of Genocide, art. 4, Dec. 9, 1948,

102 Stat. 3045 (1988), 78 U.N.T.S. 277. Based on these and other treaties, as well as international practice implementing treaties, a United Nations survey rejects corporate liability for human rights violations. *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises* ¶44, 4th Sess., Feb. 9, 2007, U.N. Doc. A/HRC/4/35 (Feb. 19, 2007) [hereinafter "U.N. Report"] (concluding that, while "corporations are under growing scrutiny by the international human rights mechanisms," "it does not seem that the international human rights instruments [surveyed in the Report] currently impose direct legal responsibilities on corporations").

Fifth, the substance of corporate liability lacks "a specificity comparable to the features of the 18th-century paradigms" like piracy, *Sosa*, 542 U.S. at 725, such that international law would provide a court with no firm guide to its judicial administration. When and how shall the acts of a corporate agent, employee, or officer be attributed to the corporate entity itself? What degree of intent need be demonstrated to hold the corporation liable? May courts "pierce the corporate veil" to reach parent companies and beneficial owners, and if so, what showing is required to do so? Most fundamentally, at what point is responsibility so attenuated that liability ends? Unlike the case with the obligations of states or individuals, there is no accepted answer to this question under customary international law, and national domestic practices vary widely. *See* U.N. Report

¶¶28-32, 34 (describing "significant national variations [that] remain in modes of attributing corporate liability").

This severe under-determination of the law is a result of the complete absence of precedent imposing corporate liability under international law and indicates the impossibility, under present doctrines, of applying norms of international law to corporate defendants in any consistent fashion. Once again, the "degree of 'codification or consensus' is simply too slight," *Tel-Oren*, 726 F.2d at 792 (Edwards, J., concurring), to establish a binding norm of corporate liability.

Sixth, and finally, the Court should not assume that Congress intended to establish an incongruity between the TVPA and the ATS. As described above, the plain language of the TVPA, exclusive of any of the baggage of customary law, restricts liability to natural persons. There is no apparent or obvious reason that Congress would have chosen to provide a cause of action for citizens that is limited to obtaining relief from natural persons, if the ATS (through its incorporation of customary international law) authorized citizens of foreign countries to sue natural persons and corporations in U.S. courts. A proper view of international law as not authorizing corporate liability avoids this incongruity.

Accordingly, the Court should read the TVPA, consistent with customary international law and the

plain meaning of the statutory text, to limit liability to natural persons.

C. Congress Did Not Accept the Tradeoffs That Deviating from Customary International Law Would Entail

By going against the grain of customary international law, Petitioners' proffered interpretation of the TVPA gives rise to serious policy concerns that Congress was unlikely to have intended.

First, the specter of litigation and eventual liability would put U.S. businesses at a distinct disadvantage relative to their international competitors that may not be subject to jurisdiction in U.S. courts. Defending against accusations of foreign misconduct is expensive, both in terms of legal fees and expenses and distraction of key personnel from their ordinary business duties. Perhaps even greater, though, is the reputational injury that comes with being named as a defendant in litigation alleging human rights abuses. Even successful litigation cannot, as a practical matter, fully clear the name of a company that has been accused of serious wrongs in court and has suffered years of adverse publicity as the case winds its way through the legal system. Congress is well aware of lawsuit abuse, particularly against U.S. businesses, *see, e.g.*, *The Lawsuit Abuse Reduction Act: Hearing Before the Subcomm. on the Const. of the H. Comm. on the Judiciary*, 112th Cong. (2011), and is justifiably proud of U.S. businesses' strong records of leadership

on human-rights issues. There is no reason to believe that Congress would have subjected domestic firms to a globally unique disability.

Second, these same risks would discourage foreign firms from doing business in the United States and subjecting themselves to the jurisdiction of its courts for claims arising from any of their foreign operations. *Cf.* U.S. Dep't of Commerce, *The U.S. Litigation Environment and Foreign Direct Investment* 5-6 (2008) (discussing how liability risks discourage foreign direct investment in the United States). Again, there is no reason to believe that a U.S. Congress so attentive to business investment in the United States and the international competitiveness of our domestic business environment would have taken such a step so casually.

Third, and most damaging, corporate liability would have the primary effect of discouraging U.S. firms from doing business in the developing world, where weak or ineffectual governance is often the norm. Due in part to political instability, alleged conduct within developing nations has been at the heart of most litigation against corporations under both the ATS and the TVPA. *See* John B. Bellinger, *Will Federal Court's* Kiobel *Ruling End Second Wave of Alien Tort Statute Suits?*, Wash. Legal Found. (2010), 2, http://www.wlf.org/Upload/legalstudies/legalbackgrounder/11-12-10Bellinger_LegalBackgrounder.pdf ("Virtually every major corporation doing business in conflict-torn regions has faced ATS litigation."). Business investment and engagement is crucial to lifting

the populations of these nations out of the condition of poverty, and encouraging such development is a cornerstone of U.S. foreign policy. *See, e.g.*, 22 U.S.C. § 2191 (declaring purpose of Overseas Private Investment Corporation). Litigation risk under the TVPA for operating in the developing world would have the perverse effects of discouraging foreign engagement and development in the regions where it is most important and, by reducing economic opportunities in these regions, causing enormous harm to their institutions and residents. *See, e.g.*, Brief for the United States as Respondent Supporting Petitioner at 44-45, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (No. 03-339) (describing the "potentially disruptive effects of [ATS] litigation on the foreign policy interests of the United States").

To be sure, Congress would be within its powers to weigh these tradeoffs and determine that the benefits of corporate liability exceed the costs, but it never did so, because it did not believe the TVPA to break with customary international law. It therefore intended to make no trade-off at all. The Court should defer to Congress's judgment on that point.

CONCLUSION

For the foregoing reasons, *amicus* urges this Court to hold that, consistent with customary international law and its plain meaning, the Torture

Victim Prevention Act does not permit actions against private collective entities.

Respectfully submitted,

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FEBRUARY 2012

AMICUS CURIAE BRIEF

FILED
DEC 20 2011
OFFICE OF THE CLERK

Nos. 10-1491 & 11-88

IN THE
Supreme Court of the United States

ESTER KIOBEL, INDIVIDUALLY AND ON BEHALF OF HER LATE HUSBAND, DR. BARINEM KIOBEL, ET AL.,
Petitioners,

v.

ROYAL DUTCH PETROLEUM CO., et al.,
Respondents.

ASID MOHAMAD, ET AL.,
Petitioners,

v.

PALESTINIAN AUTHORITY AND PALESTINE LIBERATION ORGANIZATION,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURTS OF APPEALS FOR THE SECOND CIRCUIT AND THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR AMICI CURIAE LAW PROFESSORS OF CIVIL LIBERTIES AND 42 U.S.C. § 1983 IN SUPPORT OF PETITIONERS

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December 20, 2011

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RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987) 9

INTEREST OF AMICI CURIAE

Amici curiae are scholars who specialize in, teach and have written in the area of civil liberties law generally, and the law pertaining to 42 U.S.C. § 1983 of the 1871 Civil Rights Act in particular. *Amici* also have significant expertise litigating major lawsuits under § 1983, and/or the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, and the Torture Victim Protection Act ("TVPA"), 28 U.S.C. § 1350 note.

All three statutes were enacted to provide victims of the most egregious violations with a judicial forum and a means of seeking monetary damages for violations of their most fundamental rights. Because all three statutes aim to address and curtail the most serious legal violations, a consistent remedy should be available to victims regardless of whether the defendant is a natural person or private entity.

In this brief, *Amici* discuss this Court's extensive jurisprudence endorsing § 1983 liability against private actors and corporations (when sufficient ties exist between those private actors and the state). They also discuss the many instances in which lower federal courts have looked to § 1983 in interpreting the ATS and the TVPA, and why the analysis used by those courts is applicable in both cases before this Court.[1]

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[1] Written consent from all parties, in both cases before the Court, concerning the filing of *amicus curiae* briefs are on file with the Clerk of this Court. Pursuant to Rule 37.6, *amici curiae* affirm that no counsel for any party authored this brief in whole or in part, and no person or entity other than amici

SUMMARY OF ARGUMENT

This Court should look to the jurisprudence of 42 U.S.C. § 1983 to find that corporations can be sued under the ATS and the TVPA for violating the law of nations. Like the ATS and the TVPA, § 1983 was enacted to provide a federal forum and money damages to victims of the most serious violations.

Section 1983 was enacted in 1871, at the close of the Civil War, because newly-freed slaves, who were subjected to beatings, murder and other unconscionable crimes and abuses, could not obtain justice in state courts. *Monroe v. Pape*, 365 U.S. 167, 174-75 (1961). Similarly, in 1992, Congress enacted the TVPA to provide both a forum and money damages to torture victims who were foreclosed from seeking remedies against their torturers in the countries in which they had been abused.

Although there is almost no legislative history surrounding the passage of the ATS in 1789, this Court has recognized that the ATS was enacted to provide a forum and money damages for very serious torts of the eighteenth century—"offenses against ambassadors, violation of safe conducts, and piracy." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 694 (2004). In *Sosa*, this Court made clear that the ATS could be used to sue for violations of customary international law not contemplated by the first Congress, but of the same serious magnitude—such as torture. *Id.* at 712.

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curiae or their counsel contributed money to the preparation or submission of this brief.

Because the purpose of the ATS and the TVPA mirror that of § 1983, it is logical and consistent with this Court's prior decisions to look to § 1983 jurisprudence in interpreting the ATS and the TVPA for the purpose of determining whether private entities can be sued. *See, e.g., Gomez-Perez v. Potter*, 553 U.S. 474 (2008) (looking to other anti-discrimination statutes, including 42 U.S.C. § 1982 and Title IX of the Education Amendments of 1972, to find that the Age Discrimination in Employment Act of 1967 provides for retaliation claims against employers, even though the Act is silent on the issue).

In the 50 years since this Court first held that natural persons who violated constitutional rights could be sued for money damages, *see Monroe, supra*, this Court has also held that private corporations can also be sued under § 1983 for violating civil rights. *See, e.g., Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961). Since *Monroe*, this Court has addressed the corporate liability issue 12 times, and has never wavered from its holding that private corporations can be sued for violating § 1983 when there are sufficiently close ties between the private entity and the state.

Given the close similarity between § 1983, the ATS, and the TVPA, it is not surprising that for the past 30 years, lower federal courts have looked to § 1983 in interpreting certain aspects of both the ATS and the TVPA. *See, e.g., Kadic v. Karadzic*, 70 F.3d 232, 245 (2d Cir. 1996); *Sarei v. Rio Tinto, PLC*, 221 F.Supp.2d 1116 (C.D. Cal. 2002), *aff'd*. 2011 WL 5041927, slip op. at *6 (9th Cir. Oct. 25, 2011). Notably, the TVPA's legislative history

explicitly references both § 1983 and the ATS. *See* TVPA House Report, H.R. Rep. No. 367, 102d Cong., 1st Sess. 5 (1991), reprinted in 1992 U.S.C.C.A.N. 84, 87.

For the same reasons that this Court should look towards § 1983 in evaluating the corporate liability issue under the ATS and the TVPA, it should disregard its decision in *Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001) as irrelevant. In *Malesko*, this Court found that a private corporation contracting with the federal government could not be sued for violating the Constitution. *Id.* at 63. *Malesko* is irrelevant here because it was decided pursuant to *Bivens v. Six Unknown Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). In dismissing *Malesko*, this Court made clear that it was doing so solely because Congress had never authorized *Bivens*-type suits. Without such authorization, the Court believed it was necessary to limit *Bivens* suits to comparable situations—civil rights suits against natural persons acting under color of federal law.

This Court has unequivocally recognized corporate liability under § 1983 for 50 years. Because the ATS, the TVPA, and § 1983 are all statutes whose core aim is to provide a forum and a means for redress for legal violations of the most serious magnitude, this Court should rely on its well-established § 1983 jurisprudence to find that corporate liability exists under both the ATS and the TVPA.

ARGUMENT

I. THIS COURT SHOULD LOOK TO 42 U.S.C. § 1983 JURISPRUDENCE TO DETERMINE THAT CORPORATE LIABILITY EXISTS UNDER THE ALIEN TORT STATUTE AND THE TORTURE VICTIM PROTECTION ACT.

This Court should look to the well-established jurisprudence of 42 U.S.C. § 1983 of the Civil Rights Act of 1871 for guidance in determining whether corporate and organizational liability exists under the ATS and TVPA. That is because all these statutes are, at the core, almost identical in scope. All three statutes were enacted to provide victims of the most serious abuses with both a federal forum and a means of recovering damages against those who violated their most fundamental rights.

Although this is the first time this Court is considering the issue of corporate liability under the ATS and the TVPA, this Court has held unwaveringly in twelve cases, over the past 50 years, that corporate liability exists under § 1983.[2]

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[2] The 12 cases are: *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972); *Jackson v. Metro. Edison Co.*, 419 U.S. 345 (1974); *Gilmore v. City of Montgomery, Ala.*, 417 U.S. 556 (1974); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978); *Blum v. Yaretsky*, 457 U.S. 991 (1982); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982); *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982); *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179 (1988); *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40

The Court's reasoning in those cases easily applies to claims brought under the ATS and the TVPA.

Looking to § 1983 jurisprudence for guidance on this issue is consistent with this Court's well-established practice of statutory interpretation. When a statute's text or legislative history is silent or ambiguous on a particular issue, this Court has looked to the general purpose of similar statutes to inform its statutory interpretation. For example, in 2008, this Court found that the Age Discrimination in Employment Act of 1967 (ADEA) contemplated liability for retaliation claims against employers, even though the ADEA was silent on the issue. *Gomez-Perez v. Potter*, *supra*, 553 U.S. at 481.

Rather than foreclosing the retaliation claim on those grounds, this Court looked to other antidiscrimination statutes, such as 42 U.S.C. § 1982 and Title IX of the Education Amendments of 1972 (20 U.S.C. § 1681), to find that the retaliation claim could proceed under the ADEA. *Id.* at 479; *accord Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969) (finding that a retaliation claim could be brought under 42 U.S.C. § 1982); *Jackson v. Birmingham Bd. of Ed.*, 544 U.S. 167 (2005) (interpreting Title IX of the Education Amendments of 1972 as prohibiting gender discrimination in the form of retaliation). The Court found that "the context . . . is the same in all three cases: that is, all three cases involve remedial provisions aimed at prohibited discrimination." *Gomez-Perez v. Potter*, *supra*, 553 U.S. at 481.

(1999); *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288 (2001).

As such, it is both logical and consistent with this Court's practice to look to the well-settled jurisprudence of 42 U.S.C. § 1983 to inform its consideration of corporate and other private liability in both *Kiobel v. Royal Dutch Petroleum* and *Mohamad v. Rajoub*.

A. The Alien Tort Statute and the Torture Victim Protection Act are Substantively Very Similar to § 1983.

Section 1983, also known as the Ku Klux Klan Act, was enacted in 1871 to provide newly-freed slaves with a federal forum to sue for money damages for violations of their most fundamental rights by persons acting under color of law. *Monroe*, *supra*, 365 U.S. at 172-76. A federal statute was needed because newly freed slaves could not obtain justice in state courts.[3] *Id.* While the Civil Rights Act was being debated on the floor of the House of Representatives, Representative Beatty explained:

> [C]ertain States have denied to persons within their jurisdiction the equal protection of the laws. The proof on this point is voluminous and

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[3] It is well-settled, however, since *Monroe*, that even though state court remedies are now available to plaintiffs whose constitutional rights have been violated, those plaintiffs need not exhaust those state court remedies before filing suit under § 1983. *Monroe, supra*, 365 U.S. at 183 ("The federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked.").

> unquestionable. . . . [M]en were murdered, houses were burned, women were outraged, men were scouraged [sic], and officers of the law shot down; and the State made no successful effort to bring the guilty to punishment or afford protection or redress to the outraged and innocent. The State, from lack of power or inclination, practically denied the equal protection of the law to these persons.

Cong. Globe, 42d Cong., 1st Sess., App. 166-167, p.428 (second and third alteration in original).

Like § 1983, the TVPA was enacted to provide a federal damages remedy to victims of torture (including U.S. citizens) who did not have another forum to adjudicate their claims. Congress enacted the TVPA in response to the dismissal of *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984), an ATS suit in which plaintiffs alleged claims of torture and extrajudicial killings. *See* S. Rep. No. 102-249, at 4-5 (1991); H.R. Rep. No. 102-367, at 4 (1991); H.R. Rep. No. 100-693, at 2 (1988). As the Senate Judiciary Committee reported:

> While nearly every nation now condemns torture and extrajudicial killing in principle, in practice more than one-third of the world's governments engage in, tolerate, or condone such acts. . . . Judicial protection against flagrant human

> rights violations is often least effective in those countries where such abuses are most prevalent. A state that practices torture and summary execution is not one that adheres to the rule of law. Consequently, the [TVPA] is designed to respond to this situation by providing a civil cause of action in U.S. courts for torture committed abroad.

S. Rep. No. 102-249, at 3-4.

Torture is a *jus cogens* violation of customary international law. Restatement (Third) of Foreign Relations Law of the United States § 702 cmt.n. It is reprehensible, universally condemned, and the subject of multiple international treaties, including some ratified by the United States. *See, e.g.*, Convention Against Torture and Other Cruel, Inhumane, or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85; Int'l Covenant on Civil and Political Rights, arts. 4 and 7, Mar. 23, 1976, 999 U.N.T.S. 171.

Although the ATS has almost no legislative history, *Sosa, supra*, 542 U.S. at 712 ("no one seems to know whence it came"), the ATS, like both the TVPA and § 1983, was enacted to provide a forum for serious harms that lacked a readily available remedy. This Court noted that the ATS was created because the early republic "was hamstrung by its inability to 'cause infractions of treaties, or of the law of nations to be punished.'" *Id.* at 716 (quoting JAMES MADISON, JOURNAL OF THE CONSTITUTIONAL CONVENTION 60 (E. Scott ed. 1893)). In response, Congress passed the ATS to provide an effective

venue to redress serious international wrongs, such as piracy, violation of safe passage, and assaults on ambassadors. *Id.* at 716-24.

Since *Filártiga v. Peña-Irala*, 630 F.2d 876, (2d Cir. 1980), the ATS has been used to allow victims of human rights violations who may have no other forum to sue their abusers for damages. *See, e.g., Kadic, supra*, 70 F. 3d at 250 (noting that "no party has identified a more suitable forum, and we are aware of none. . . . [T]he former Yugoslavia, either in Serbia or war-torn Bosnia, are not now available to entertain plaintiffs' claims."); *Eastman Kodak Co. v. Kavlin*, 978 F.Supp. 1078, 1084-87 (S. D. Fla. 1997) (dismissing a forum non conveniens challenge to ATS jurisdiction on the basis of widespread corruption in the Bolivian judiciary).[4]

In *Sosa*, this Court recognized the important role that federal courts play—and should continue to play—in adjudicating human rights violations, under the authority granted to them by Congress through the ATS. *Sosa, supra*, 542 U.S. at 724-25. This Court gave its seal of approval for using the ATS not just for the three torts for which it was used in the eighteenth century, but also for human rights abuses of comparable magnitude. *Id.* Thus, even though torture was not among the customary international law violations originally contemplated by Congress when it enacted the

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[4] Notably, however, ATS does not explicitly require plaintiffs to demonstrate the lack of another available forum or that they exhausted remedies in the country where violations occurred. *See Sarei v. Rio Tinto PLC*, 487 F.3d 1193, 1223 (9th Cir. 2007) (declining to "read an exhaustion requirement into the ATCA").

ATS, this Court, quoting *Filártiga*, found that the ATS could be used to sue torturers and others who inflict comparable abuses. *See id.* at 731-33 ("[F]or purposes of civil liability, the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind"); *id.* at 762 (Breyer, J., concurring) ("[U]niversal jurisdiction exists to prosecute . . . torture, genocide, crimes against humanity, and war crimes.").[5]

Given these similarities in purpose, it is not surprising that the legislative history of the TVPA explicitly references § 1983 as a useful guide for

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[5] This finding is consistent with 30 years of ATS decisions in lower federal courts. *See also Abebe-Jira v. Negewo*, 72 F.3d 844 (11th Cir. 1996) (affirming judgment against military dictatorship leader for torture and cruel, degrading treatment); *Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996) (affirming $2 billion ATS class claim against estate of former president of Philippines for torture, summary executions, and disappearances); *Kadic v. Kardzic*, 70 F. 3d 232 (2d Cir. 1995) (holding that the President of the self-proclaimed Bosnian-Serb republic of "Sprska" may be liable under the ATS for personally planning and ordering genocide and war crimes designed to destroy the religious and ethnic groups of Bosnian Muslims and Bosnian Croats); *Mehinovic v. Vuckovic* 198 F. Supp. 2d 1322 (N. Ga. 2002) (finding former Bosnian-Serb military commander liable for torture under ATS); *Jama v. U.S. I.N.S.*, 22 F.Supp.2d 353 (D.N.J. 1998) (recognizing that horrendous detention conditions of political asylum seekers are actionable under the ATS); *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995) (finding that a Guatemalan official violated international law by the torture, assault, and false imprisonment of Guatemalan citizens by forces under his command and that he could thereby be held liable under ATS); *Forti v. Suarez-Mason*, 694 F. Supp. 707 (N.D. Cal. 1988) (recognizing disappearance as an actionable claim under the ATS).

statutory construction. *See* TVPA House Report, H.R. Rep. No. 367, 102d Cong., 1st Sess. 5 (1991), reprinted in 1992 U.S.C.C.A.N. 84, 87 ("Courts should look to 42 U.S.C. § 1983 in construing 'color of law' and agency law in construing 'actual or apparent authority.'"). Congress also made clear that the TVPA provided U.S. citizens who suffered torture with a cause of action comparable to the ATS. *Id.* at 86 ("While the Alien Tort Claims Act provides a remedy to aliens only, the TVPA would extend a civil remedy also to U.S. citizens who may have been tortured abroad."). This serves as an endorsement by Congress for courts to evaluate and interpret these statutes together, in appropriate circumstances, such as here.[6]

As such, given that the ATS, the TVPA, and § 1983 were all enacted to redress violations of comparable grave magnitude, this Court should rely on the well-settled jurisprudence of § 1983 to inform its consideration of corporate and organizational liability under the ATS and the TVPA.

B. For 50 Years, This Court has Recognized Corporate Liability Under 42 U.S.C. § 1983.

In 1961, this Court held for the first time that § 1983 permitted damages actions against state actors who commit constitutional torts,

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[6] As discussed in more detail in note 9, *infra*, it is not always appropriate to interpret these statutes identically because of differences in the statutes' language. For example, while both § 1983 and the TVPA require state action, the ATS's language does not.

ushering in the field of constitutional damages litigation. *See Monroe, supra*, 365 U.S. at 172 (holding Chicago police officers could be sued for conducting an illegal search and seizure in violation of the Fourth Amendment). Section 1983 is silent on the issue of corporate liability. Nevertheless, there has been no question in the 50 years since this Court began interpreting and applying § 1983 that private corporations, like natural persons, can be held liable for constitutional torts, as long as there is sufficient state action.

Notably, *Burton v. Wilmington Parking Auth.*, 365 U.S. 715 (1961), the first private corporate liability case under § 1983, was decided the very same year as *Monroe*. While there was much debate in *Monroe* between the Justices about whether Congress contemplated damages actions against natural persons under the statute, no such debate occurred in *Burton*. Thus, from the very start, corporate liability under § 1983 was a given.

Between 1961 and 2011, this Court has considered no fewer than 12 corporate liability cases under § 1983 without ever questioning the propriety of such liability.[7] Of all these cases, only one discusses, in a very cursory fashion, the legislative history of § 1983 as it relates to corporate liability. *See Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 926-35 (1982). The *Lugar* Court noted that the Civil Rights Act was passed "for the express purpose of 'enforc[ing] the Provisions of the Fourteenth Amendment,'" and it would be "wholly inconsistent with the purpose of § 1 of the Civil

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[7] *See supra* note 2.

Rights Act of 1871, from which § 1983 is derived," to allow a private entity to escape liability when its conduct implicates state action. *Id.* at 934 (quoting *Lynch v. Household Finance Corp.*, 405 U.S. 538, 545 (1972)) (internal citations omitted).

Significantly, from 1961 to 1978, this Court explicitly rejected municipal corporate liability under § 1983. It was only in *Monell v. Dep't of Soc. Services of the City of New York*, 436 U.S. 658, 721-25 (1978), that this Court overruled *Monroe* on that issue. But during the same 17-year time span, this Court repeatedly reaffirmed private corporate liability under § 1983. *See Burton, supra*; *Adickes v. S. H. Kress & Co.*, 398 U.S. 144 (1970); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972); *Jackson v. Metro. Edison Co.*, 419 U.S. 345 (1974); *Gilmore v. City of Montgomery, Ala.*, 417 U.S. 556 (1974); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149 (1978).

The central inquiry when a private corporation is sued for a constitutional tort under § 1983 is not the corporate nature of the defendant. Rather, it is whether a sufficiently close relationship exists between the private actor and the state to hold the private actor accountable for constitutional violations. There is no bright line rule that can resolve that question. Rather, "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." *Burton, supra*, 365 U.S. at 722; *see also Jackson, supra*, 419 U.S. at 349-50 ("[W]hether particular conduct is 'private,' on the one hand, or 'state action,' on the other, frequently admits of no easy answer.").

This Court has employed a number of different approaches in conducting its inquiries into

§ 1983 liability for private corporations and entities. For example, the Court used the "symbiosis" analysis in *Burton*, *supra*, 365 U.S. at 722. Other symbiosis cases include *Moose Lodge No. 107*, *supra*; *Gilmore*, *supra*; and *Flagg Bros., Inc.*, *supra*. Similarly, this Court articulated the "nexus" analysis in *Adickes*, *supra*. Other nexus cases include *Jackson*, *supra*; *Blum v. Yaretsky*, 457 U.S. 991 (1982); *Lugar*, *supra*; *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982); *Nat'l Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179 (1988); and *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40 (1999). In its most recent § 1983 corporate liability case, *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n*, 531 U.S. 288 (2001), the Court applied the "entwinement" analysis, which it first used 35 years earlier in *Evans v. Newton*, 382 U.S. 296 (1966).

Regardless of which analysis it has used, in five decades, this Court has never questioned the validity of its 1961 *Burton* holding that private corporations may be held liable for constitutional torts under § 1983.[8]

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[8] The substance of any disagreement between members of this Court in this series of cases has never been whether corporate liability exists under § 1983. Rather, in some instances, Justices have debated what level of engagement is needed between a private corporation and the state to fairly characterize the private conduct as state action. and what analyses should be used to determine if state action is present. *See, e.g.*, *Moose Lodge No. 107*, *supra*, 526 U.S. at 176, 180 (disagreement between majority and dissent over whether government licensing practices involved state action in the context of a private dining club that refused to serve a member's guest on account of race); *Brentwood Acad.*, *supra*, 531 U.S. at 300 (disagreement between the majority and

C. Lower Federal Courts Already Rely on § 1983 Jurisprudence to Interpret the Alien Tort Statute and the Torture Victim Protection Act.

Given the similarity between § 1983, the ATS, and the TVPA, it is not surprising that, for three decades now, the lower federal courts have looked to § 1983 in evaluating human rights claims, where appropriate.[9] Determining corporate liability

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dissent over the appropriate use of the "entwinement" analysis).

[9] It is not always appropriate or necessary to look to § 1983 in interpreting the ATS. Section 1983 always requires state action. That is not the case in all ATS cases. For example, in *Kadic*, the Second Circuit Court held that "certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals." *Kadic*, *supra*, 70 F.3d at 239. Thus, federal courts have held that no state action is needed in ATS lawsuits alleging certain *jus cogens* violations, such as torture, genocide, piracy, prohibitions against the slave trade, and certain war crimes. *See, e.g.*, *Doe I v. Unocal Corp.*, 395 F.3d 932, 964 (9th Cir. 2002) (stating that "a cause of action against non-state actors for conduct in which they engage directly exists only for acts that constitute jus cogens violations"); *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1266-67 (11th Cir. 2009) (finding that "[s]ome acts, such as torture and murder committed in the course of war crimes, violate the law of nations regardless of whether the perpetrator acted under color of law"); *M.C. v. Bianchi*, 782 F.Supp.2d 127, 132 (E.D. Pa. 2011) (recognizing that no state action is required for piracy and enslavement and that private "liability for human rights violations dates back to at least the Nuremberg Trials."); *Wissam Abdullateff Sa'eed Al-Quraishi v. Adel Nakhla*, 728 F.Supp.2d 702, 742 (D. Md. 2010)

under the ATS and the TVPA is one of these appropriate circumstances.

Indeed, § 1983 was discussed in 1980 in *Filártiga, supra,* 630 F.2d at 885 n.18, the very first human rights-related ATS case. There, the Court of Appeals for the Second Circuit noted that "[c]onduct alleged [in the case] would be actionable under 42 U.S.C. § 1983 . . . if performed by a government official." *Id.* Similarly, in *Kadic, supra,* 70 F.3d at 245, the Second Circuit also held that § 1983 was relevant in interpreting both the ATS and the TVPA: "The 'color of law' jurisprudence of 42 U.S.C. § 1983 is a relevant guide to whether a defendant has engaged in official action for purposes of jurisdiction under the Alien Tort Act." It also held that, when construing the TVPA, the "courts are instructed to look to principles of agency law and to jurisprudence under 42 U.S.C. § 1983, respectively." *Id.*

Relying on the Second Circuit's "instruct[ion] that applicable principles from the jurisprudence of § 1983 of the Civil Rights Act should guide the courts" in analyzing human rights violations under both the ATS and the TVPA, the U.S. District Court for the Southern District of New York found that a private political party could be sued under both statutes. *Tachiona v. Mugabe*, 169 F.Supp.2d 259, 314 (S.D.N.Y. 2001). That is because the political party "worked in tandem with Zimbabwe government officials, under whose direction or

---

(concluding that "some offenses against the law of nations can be committed by private parties, [while] others require state action"); *Adhikari v. Daoud & Partners*, 697 F.Supp.2d 674, 685 (S.D. Tex. 2009) (recognizing that "state action requirement under the ATS is not absolute.").

control many of the wrongful acts were conceived and executed," becoming "an integral arm of the state." *Id.* at 315.

Similarly, in *Forti v. Suarez-Mason*, 672 F.Supp. 1531, 1546 (N.D. Cal. 1987), the court found that "[c]laims for tortious conduct of government officials under 28 U.S.C. § 1350 may be analogized to domestic lawsuits brought under 42 U.S.C. § 1983 . . . ." Along these same lines, in 2002, the U.S. District Court for the Central District of California allowed an ATS suit to go forward against a private mining group that committed human rights violations, including war crimes, through its collaboration with the Papua New Guinea government. *Sarei, supra*, 221 F.Supp.2d 1116 (C.D. Cal. 2002). The court relied extensively on § 1983 jurisprudence in evaluating the relationship between the defendant mining group and the State. *Id.* at 1139-49, 1153. In affirming that opinion, the Court of Appeals for the Ninth Circuit explicitly disagreed with *Kiobel's* holding that the ATS does not contemplate corporate liability. *See Sarei v. Rio Tinto PLC*, Nos. 02-56256, 02-56390, 09-56381, 2011 WL 5041927, slip op. at *6 (9th Cir. Oct. 25, 2011).

It is thus puzzling and completely inconsistent with its prior ATS and TVPA holdings that the Second Circuit Court of Appeals did not look to § 1983 in examining the corporate liability issues in *Kiobel*, and that the Court of Appeals for the D.C. Circuit also ignored that well-settled body of law in deciding *Mohamad*.

II. *CORRECTIONAL SERVICES CORP. v. MALESKO* SHOULD HAVE NO BEARING ON THE COURT'S ANALYSIS.

Correctional Services Corp. v. Malesko, 534 U.S. 61, 63 (2001). should have no bearing on this Court's review of *Kiobel* and *Mohamad*. Malesko was an inmate who was detained in a halfway house operated by a private corporation contracted by the federal Bureau of Prisons. *Malesko, supra*, 534 U.S. at 64. Malesko suffered a heart attack after the private prison's guards ignored medical orders and made him walk up five flights of stairs. *Id.* Subsequently, he filed an action against the prison corporation pursuant to *Bivens, supra*, 403 U.S. at 396.

Bivens dealt specifically with violations of the Fourth Amendment by federal officials. *Id.* at 395-96. No statute existed to provide redress for such wrongs. As such, this Court created a cause of action to "grant the necessary relief" when "federally protected rights" have been violated by federal officials. *Id.* at 392. As the *Malesko* Court noted, the *Bivens* remedy has been extended to cover only two additional types of circumstances: violations of the Due Process Clause of the Fifth Amendment in *Davis v. Passman*, 442 U.S. 228 (1979), and violations of the Cruel and Unusual Punishment Clause of the Eighth Amendment in *Carlson v. Green*, 446 U.S. 14 (1980). *Malesko, supra*, 534 U.S. at 70-71.

In denying relief in *Malesko*, the Court reasoned that extending *Bivens* to include liability for private corporations would stray from the

purpose of *Bivens* actions, which is to deter federal officials from violating the Constitution. *Malesko*, *supra*, 534 U.S. at 69. Notably, this Court made very clear that it was not extending *Bivens* liability to corporations because Congress had never endorsed *Bivens*-type lawsuits. *Id.* at 72.

As such, *Malesko* has no bearing on § 1983 claims. Its holding is limited to circumstances related to judicially-created remedies. Evidence of this is this Court's affirmation of corporate liability in § 1983 claims in the very same year *Malesko* was decided. *See Brentwood Acad.*, *supra*, 531 U.S. at 295 (successfully applying the "entwinement" analysis).

Not surprisingly then, after *Malesko*, lower federal courts have continued to recognize corporate liability in § 1983 claims with facts very similar to those in *Malesko*. *See, e.g., Rosborough v. Mgmt. & Training Corp.*, 350 F.3d 459, 461 (5th Cir. 2003) ("Clearly, confinement of wrongdoers—though sometimes delegated to private entities—is a fundamentally governmental function. These corporations and their employees are therefore subject to limitations imposed by the Eighth Amendment."); *Woodward v. Corr. Med. Servs. of Ill., Inc.*, 368 F.3d 917, 927 (7th Cir. 2004) (holding that for the purposes of § 1983, a "corporate entity violates an inmate's constitutional rights 'if it maintains a policy that sanctions the maintenance of prison conditions that infringe upon the constitutional rights of the prisoners.'" (quoting *Estate of Novack ex rel. v. County of Wood*, 226 F.3d 525, 530 (7th Cir. 2000))); *Olivas v. Corr. Corp. of Am.*, 408 F.Supp.2d 251, 254 (N.D. Tex. 2006) ("[A] private corporation . . . may be sued

under 42 U.S.C. § 1983 for alleged constitutional injury. because the operation of a prison is a fundamental government function.").

In analyzing *Kiobel* and *Mohamad* then, this Court should look exclusively to § 1983 jurisprudence for guidance and by-pass all *Bivens* jurisprudence, including *Malesko*. Any of the Court's reservations articulated in *Malesko* are irrelevant here, because both the ATS and TVPA, like § 1983 were endorsed by Congress.

* * *

At its most basic, liability for torts serves our society's compelling interest in redressing wrongs and deterring future misconduct. This bedrock idea has shaped our jurisprudence and given life to the principle that for every right there should be a remedy: "[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded." 3 WILLIAM BLACKSTONE, COMMENTARIES *23; *accord*, *Marbury v. Madison*, 5 U.S. 137, 163 (1803).

As such, whether the murderer or torturer acts as a natural person, or through a corporation (or some other private entity) should be of no more consequence to the Court's analysis of the ATS and the TVPA than it would be under § 1983. This is particularly true because this Court has previously stated that "[t]he Alien Tort Statute by its terms does not distinguish among classes of defendants." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 438 (1989) (discussing the interplay between the ATS and the Foreign

Sovereign Immunities Act, 28 U.S.C. § 1602, *et seq.*).

CONCLUSION

For the foregoing reasons, this Court should reverse the judgments of the Courts of Appeals in both the *Kiobel* and *Mohamad* cases.

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APPENDIX

APPENDIX

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AMICUS CURIAE BRIEF

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No. 11-88

IN THE

Supreme Court of the United States

ASID MOHAMAD, ET AL.,

Petitioners,

v.

PALESTINIAN AUTHORITY AND PALESTINE LIBERATION ORGANIZATION,

Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF AMICUS CURIAE PROFESSOR JUAN MÉNDEZ, U.N. SPECIAL RAPPORTEUR ON TORTURE, IN SUPPORT OF PETITIONERS

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STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus curiae Juan E. Méndez is the United Nations Special Rapporteur on the question of torture and other cruel, inhuman. or degrading treatment or punishment pursuant to General Assembly resolution 60/251 and to Human Rights Council resolution 16/23.[1]

This submission is drafted on a voluntary basis to the Supreme Court of the United States in the case of *Mohamad v. Palestinian Authority & Palestine Liberation Organization* for the Court's consideration without prejudice to, and should not be considered as a waiver, express or implied, of the privileges and immunities of the United Nations, its officials and experts on missions, pursuant to the 1946 Convention on the Privileges and Immunities of the United Nations.

Pursuant to U.N. Human Rights Council 16/23 (A/HRC/RES/16/23), Méndez acts under the aegis of the Human Rights Council without remuneration as an independent expert within the scope of his mandate which enables him to seek, receive, examine

---

[1] Counsel of record for all parties have consented to the filing of this amicus curiae brief and such consents have been lodged with the Court. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than the amicus or his counsel made a monetary contribution to this brief's preparation or submission.

and act on information from numerous sources, including individuals, regarding issues and alleged cases concerning torture and or other cruel, inhuman or degrading treatment or punishment.

Professor Méndez is the author, with Marjory Wentworth, of *Taking A Stand* (New York: Palgrave-MacMillan, October 2011), which examines the uses of arbitrary detention, torture, disappearances, rendition and genocide in countries around the world.

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SUMMARY OF ARGUMENT

The prohibition against torture is a bedrock principle of international law. All nations are obliged to prevent, investigate, and punish its commission, and to provide effective redress to victims. Narrowly reading the Torture Victim Protection Act of 1991 (hereinafter "TVPA"), 28 U.S.C. § 1350 as limited to flesh and blood perpetrators, while rendering organizations and other entities immune from suit, would put the United States at odds with both its domestic and international obligations, and contribute to a culture of impunity wherein entities could quite literally get away with murder.

I. International law forbids official torture under all circumstances and by all actors. The prohibition is reflected in the Universal Declaration of Human Rights and the Geneva Conventions and is so widely accepted that it has become customary international law. Instruments to which the United States is a Party, such as the International Covenant on Civil and Political Rights and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Convention Against Torture, or CAT) make clear that a State may not derogate its responsibility to punish, deter and redress torture under any circumstances. CAT, Dec. 10, 1984.

The prohibition extends to all actors who participate or are complicit in torture. This includes not only natural persons who inflict physical or psychological pain, but also the legal persons or entities that direct and support them. Traditional governments are subject to international laws

against torture, as are armed rebel groups and quasi-governmental entities like the Palestinian Authority, which "have set up quasi-governmental institutions" in areas that lack a central or formal government. *Sadiq Shek Elmi v. Australia*, ¶ 6.5, U.N. Doc. CAT/C/22/D/120/1998, (May 25, 1999).

II. States are required to do more than simply criminalize torture. The CAT, ICCPR, customary international law, and regional human rights bodies all require States to provide victims with an effective remedy against perpetrators. To hold, as the D.C. Circuit did, that non-State entities can evade this liability simply by virtue of their organizational status, would deny victims their right to an effective remedy.

Across the globe, States fulfill their obligation to implement domestic mechanisms for recourse against torturers. Many nations provide criminal liability against legal entities that violate international human rights law. The United Kingdom, to which American legal tradition traces its roots, provides corporate liability for torture under its common law torts and other domestic legislation. Nations from New Zealand to South Africa provide criminal liability for legal entities directly in their constitutions. Most Latin American nations reach the same result through *amparo* procedures that allow torture victims to vindicate their rights in domestic civil courts, in addition to damage remedies: many of these countries permit suits against legal entities.

III. States' international law obligation to prevent, punish and redress torture requires a victim-centered approach. The duty to provide redress must encompass entity liability, otherwise an

entire class of victims would be deprived of access to justice. Torture is an abomination no matter who commits it. Exempting corporations or unincorporated groups from liability would be akin to providing an impermissible amnesty for acts that are unquestionably illegal.

In sum, international law, the practice of nations that implement it, and their obligations to provide effective redress, all compel the conclusion that legal entities must be subject to the prohibition against torture to the same extent as natural persons.

ARGUMENT

I. International law prohibits participation or complicity in official torture by all actors and entities, in all circumstances.

The prohibition against official torture in international law is clear. Multilateral treaties, statements by the U.N. General Assembly, and statements and national laws worldwide demonstrate that torture is universally prohibited and that this norm is non-derogable. To reinforce this norm, international law likewise prohibits participation in torture by all actors, including organizations and corporations that either abet State actors or themselves act in an official capacity.

A. While purely private acts of torture and ill-treatment do not always implicate international law, all torture during wartime or under official authority is prohibited, without exception.

The prohibition against torture was among the rights recognized in the Universal Declaration of Human Rights in 1948: "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Universal Declaration of Human Rights, Art. 5, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st Plen. Mtg., U.N. Doc. A/810 (Dec. 12, 1948). This prohibition has been consistently expressed in both humanitarian law, which applies during armed conflict, and international human rights law. Torture was among the practices forbidden in *all* armed conflicts – international or internal – by Common Article 3 of the 1949 Geneva Conventions. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516.

The prohibition on official torture was enshrined in the International Covenant on Civil and Political Rights (ICCPR) in 1966 which repeats the language of the Universal Declaration. International Covenant on Civil and Political Rights (ICCPR), art. 7, Dec. 16, 1966. Indeed, this prohibition is so fundamental is as to be included among those principles that may never be derogated from under the ICCPR. *Id.* art. 4(2).

The prohibition on torture finds its most detailed expression in the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. CAT, Dec. 10, 1984.

Not only does the CAT reiterate that "[n]o exceptional circumstances whatsoever . . . may be invoked as a justification of torture," *id.* art. 2(2), it also requires States to criminalize torture, and to prosecute any torturer who remains in their territory. *Id.* arts. 4(1), 5(2) & 7(1).

The U.N. Security Council further recognized the prohibition on torture when it created the

International Criminal Tribunals for the former Yugoslavia and the International Criminal Tribunal for Rwanda. The statutes of both tribunals, which are intended to implement customary international law, recognize that torture can constitute both a war crime and a crime against humanity. *See* U.N. Secretary-General, Report submitted pursuant to paragraph 2 of Security Council Resolution 808 (1993), U.N. Doc. S/25704, 3 May 1993, § 34 (noting that the ICTY "should apply rules of international humanitarian law which are beyond any doubt part of customary law").[4]

B. The prohibition against torture extends to participation in torture by all actors and entities cloaked in official authority, including organizations and corporations.

The international law prohibition against torture extends to all actors, including organizations, who participate in torture cloaked in official authority. As the Committee against Torture, the body authorized to interpret the Convention has noted: "The State's obligation to prevent torture also applies to all persons who act, de jure or de facto, in the name of, in conjunction with, or at the behest of the State Party." Comm. Against Torture, Convention Against Torture and Other Cruel, Inhuman or Degrading

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[4] Customary international (criminal) law does not require state action for torture as a crime against humanity or war crime; *Prosecutor v. Semanza* (ICTR-97-20), Appeals Chamber, 20 May 2005, § 248 (no state action requirement for torture in international criminal law).

Treatment or Punishment, General Comment No. 2, ¶ 7. Jan. 24, 2008. Moreover, where State authorities or others acting in an official capacity know or have reason to believe that torture is being committed by non-State or private actors, and fail to exercise due diligence, they are responsible for acquiescing in such impermissible acts. Committee against Torture, Gen. Cmt. No. 2, ¶ 18, Jan. 24, 2008.

The CAT requires State parties to criminalize any act "by *any person* which constitutes complicity or participation in torture." CAT, Art. 4(1) (emphasis added). This prohibition is deliberately written in the broadest language conceivable. Commentary on the Convention indicates the centrality of this provision: "It is important, in particular, that different forms of complicity or participation are punishable, since the torturer who inflicts pain and suffering often does not act alone, but his act is made possible by the support or encouragement which he receives from other persons." J. Herman Burgers & Hans Danelius, *The United Nations Convention Against Torture, A Handbook on the Convention against Torture and other cruel, inhuman, or degrading treatment or Punishment*, 129-30 (1988). Given the strength of the international prohibition on torture, there is no reason to believe that such "other persons" should exclude entities. *See*, e.g., *Kadic v. Karadzic*, 70 F.3d 232, 245 (2d Cir. 1995) (finding unrecognized Bosnian Serb authorities bound by torture prohibitions).

Thus, de-facto regimes and organizations can qualify as official entities within the meaning of Article 1 of the Convention. The Committee against Torture recognized, in particular, that private groups with de facto control over a territory

practicing torture in the absence of a recognized state government are in effect "acting in an official capacity" in the area in question. *Sadiq Shek Elmi v. Australia*, ¶ 6.5, U.N. Doc. CAT/C/22/D/120/1998, (May 25, 1999); *see also*, U.N. Comm. against Torture, Gen. Cmt No. 2, Implementation of Article 2 by States Parties, ¶ 15, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008) (under CAT, States bear international responsibility for acts and omissions of their officials and others, including agents, and private contractors); *Y.H.A. v. Australia*, ¶ 6.2, U.N. Doc. CAT/C/27/D/162/2000, (April 14, 2000) (State liability for torture includes acquiescence or non-enforcement against non-State parties known to be committing torture).

With regard to the State's due diligence obligations to prevent and punish acts of torture by non-State actors of which they are reasonably aware, the Committee focused in one opinion on the impunity of non-State actors in persecuting members of the Roma ethnic minority and the unwillingness of officials to intervene or prosecute. The Committee concluded that State actors' refusal to set up effective measures for the punishment of non-State acts of torture would itself be a violation of Art. 16 of the CAT. *See generally Hajrizi Dzemajl et al. v. Yugoslavia*, U.N. Doc. CAT/C/29/D/161/2000, §9.2 and *Concluding Observations: Third Periodic Report of the Czech Republic*, U.N. Doc. CAT/C/CR/32/2, § D(1)-(6) (June 3, 2004).

In short, the Committee Against Torture has consistently found private groups are capable of violating the international prohibition of torture, and must not be allowed to do so with impunity. Thus,

international law must "give effect to the *realities* of administrative action in a territory" rather than adhering to legal formalisms. *Sadiq Shek Elmi v. Australia*, ¶ 5.4, U.N. Doc. CAT/C/22/D120/1998 (May 25, 1999).

II. The CAT, other treaties, and customary international law, require States to provide effective remedies, including against private natural and legal persons who participate in torture.

The right to a remedy "is one of the fundamental pillars . . . of the very rule of law in a democratic society ...". *Castillo Páez v. Peru*, Merits Judgment of November 3, 1997, Inter-Am. Ct. H.R. (Ser. C) No. 34 (1997) ¶ 82. The CAT, arts. 13 and 14; ICCPR, art. 2(1); American Convention on Human Rights ("ACHR"), arts. 8(1) and 25; and European Convention on Human Rights (hereinafter "ECHR"), art. 13, all provide a right to an effective remedy where a right is alleged to have been breached in the territory or under the effective control or custody of the state concerned. Human Rights Committee, "General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant," U.N. Doc. CCPR/C/21/Rev.1/Add.13 (May 24, 2004) ¶¶ 15 – 16; *Velasquez Rodriguez v. Honduras*, Merits Judgment of July 29, 1988 (Series C No. 4), ¶¶ 62, 64-66. Article 14 (1) of the ICCPR and Article 6 of the ECHR guarantee access to court proceedings that satisfy the right to a fair trial. *See, e.g.*, Human Rights Committee, General Comment 32, Article 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32

(2007); Comm. against Torture, Draft Gen. Comment on Article 14. (*hereinafter,* "Draft Gen. Comment. on art. 14") ¶ 27 ("Judicial proceedings regarding remedies for victims should comply with fair trial guarantees to ensure effective access to justice.").

In accord with article 14, each State party to the CAT is required to "ensure in its legal system that the victim of torture obtains redress and has an *enforceable* right to fair and adequate compensation, including the means for as full rehabilitation as possible" (emphasis added). Article 14 applies to all victims of torture without discrimination of any kind.[3] Draft General Comment: Working Document on article 14 for Comments, Committee against Torture, 46th Session, 9 May-3 June 2011, ¶ 1.[4]

Article 14 is victim oriented—neither locus, nor form or identity of the perpetrator is determinative of the right to redress. As such, its scope is even

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[3] The United States deposited a reservation upon ratifying the CAT asserting the intent to apply article 14 legal remedies only to torture committed within U.S. controlled territory. Nevertheless, the U.S. government has applied the TVPA extraterritorially, in accord with the statute's object and purpose, and that of the CAT. *See* Brief for Petitioners in this case, at 36, n. 9.

[4] General Comments are non-binding, but authoritative interpretive statements of the U.N. treaty bodies, which give rise to normative consensus on the meaning and scope of particular human rights contained in the treaty. *See* Conway Blake, *Normative Instruments in International Human Rights Law: Locating the General Comment*, Center for Human Rights and Global Justice Working Paper No. 17 (2008), available at www.chrgj.org/

broader than other human rights treaties proscribing torture. The CAT has clarified that

> obligations of States parties under article 14 are not limited to victims who were harmed in the territory of the State party or by or against nationals of the State party. The Committee has praised the efforts of States parties for providing civil remedies for victims who were subjected to torture or ill-treatment outside their territory. This is particularly important when a victim is unable to exercise his or her rights guaranteed under article 14 in the territory where the violation took place. Indeed, article 14 requires States to ensure that all victims of torture are able to access remedy and obtain redress.

Draft Gen. Cmt. on Art. 14, ¶ 20.

The Human Rights Committee (hereinafter "HRC"), responsible for monitoring State compliance with the ICCPR, has also elaborated on the due diligence principle with respect to all persons or entities that participate in torture.

> [T]he positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of

> Covenant rights in so far as they are amenable to application between private persons or entities.

Human Rights Committee, General Comment 31 on The Nature of the General Legal Obligation Imposed on States Parties to the Covenant. CCPR/C/21/Rev.1/Add. 13. ¶ 8, May 26, 2004.

Like the Committee against Torture, the HRC also interprets State failure to exercise due diligence to prevent, punish, or redress harms caused by private persons or entities as giving rise to violations by the State Party itself. The HRC highlights the "interrelationship between the positive obligations imposed under article 2 and the need to provide effective remedies in the event of breach under article 2, paragraph 3". *Id.* Indeed,

> [i]t is also implicit in article 7 [of the ICCPR] that States Parties have to take positive measures to ensure that private persons or entities do not inflict torture or cruel, inhuman or degrading treatment or punishment on others within their power. . . .

Id.

Due diligence entails a duty on States "to afford everyone protection through legislative and other measures as may be necessary against torture. whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity." U.N. Human Rights Committee, General Comment No.20: concerning prohibition of torture and cruel treatment or punishment (Art. 7), ¶ 2 (October 3, 1992), U.N. Doc. CPPR 03/10/1992. Such

measures include legislation affording effective protection in practice and ensuring criminal and civil accountability of non-State actors responsible for torture.

A. States have implemented these obligations through domestic legislation that includes allowing remedies against legal persons.

Article 2 of the CAT requires States parties to implement the right to redress by enacting "effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction." Similarly, article 2(2) of the ICCPR obligates States "to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant." Further, as noted above, this article establishes an obligation to provide redress for violations by private parties as well as State agents.

In 2005, the U.N. General Assembly adopted its Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.[5] These Principles represent a "restatement of existing State obligations" under international law. Basic Principle 3(c). Significantly, the Principles note that States must provide "access to justice" for victims of serious abuses, specifically contemplating

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[5] G.A. Res. 60/147, U.N. Gaor. 60th Sess., U.N. Doc. A/RES/60/147 (March 21, 2006).

"reparation" from "a legal person, or other entity." Basic Principle 15.

Application of these general principles regarding remedies entails the conclusion that the CAT requires that redress be provided against entities or organizations as well as human beings.

1. The CAT and ICCPR require criminal remedies against all parties who torture or are complicit in torture, and States have implemented these provisions by allowing prosecution of juristic persons, including non-State entities and corporations.

As noted above, Article 4(1) of the CAT requires each State Party to criminalize torture, attempt, complicity or participation in torture *by any person* in its domestic law.

With regard to the ICCPR's obligation to provide a remedy against torture, the Human Rights Committee emphasizes that "States parties should indicate when presenting their reports the provisions of their criminal law which penalize torture. . . specifying the penalties applicable to such acts, whether committed by public officials or other persons acting on behalf of the State, *or by private persons*. Those who violate article 7, whether by encouraging, ordering, tolerating or perpetrating prohibited acts, must be held responsible." HRC, Gen. Cmt. No. 20, ¶ 13 (emphasis added).

Moreover, the Committee considers such prohibition merely a first step, requiring States

parties to report on the legislative, administrative, judicial and other measures they take to prevent and punish torture in any territory under their jurisdiction. HRC Gen. Cmt. No. 20, ¶ 8.

A 2006 survey of 16 countries found that it is prevailing practice to apply criminal liability to legal persons in the private sector for grave breaches of international law. Ramasastry, Anita, and Robert C. Thompson. *Commerce, Crime and Conflict: Legal Remedies for Private Sector Liability for Grave Breaches of International Law. A Survey of Sixteen Countries, Executive Summary*, Fafo Report 536, p. 16 (September 2006) (". . . most of the countries that have incorporated ICL [international criminal law] into their domestic statutes also do not make a distinction between natural and legal persons. . . "), *available* http://www.fafo.no/pub/rapp/536/536.pdf (*hereinafter*, "Fafo Report, Legal Remedies for Private Sector Liability").[6]

In particular, the decisive factor in the recognition of criminal liability of legal persons for torture and other violations is whether the country recognizes the criminality of legal persons as a general matter. Those countries that generally allow for corporate criminal liability also tend to apply such sanctions to legal entities.[7] For example, the explanatory

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[6] The 16 countries are Argentina, Australia, Belgium, Canada, France, Germany, India, Indonesia, Japan, the Netherlands, Norway, South Africa, Spain, Ukraine, the United Kingdom and the United States.

[7] A handful of countries recognize some form of corporate criminality and do *not* apply penal sanctions to legal entities for violations of international law, but these are special cases. In

memorandum accompanying the Netherlands' International Crimes Act notes that, although the Rome Statute of the International Criminal Court excludes jurisdiction over non-natural persons, legal persons could be prosecuted in Dutch courts for international crimes because the Criminal Code provides for corporate criminal liability. Explanatory Memorandum, Kamerstuk 28337 nr.3, Tweede Kamer (03-05-2002), at 26 (original in Dutch).[8] *See*

Spain and Argentina, for example, corporate criminality is quite new and is applied on a statute by statute basis; consequently, it still applies only to a handful of offenses. *See* Survey Response, Laws of Argentina (Tomás Ojea Quintana), 'Commerce, Crime and Conflict: A Survey of Sixteen Jurisdictions' Fafo AIS, [accessed Dec. 15, 2011] (2006); Ley Orgánica Número 5/2010, (B.O.E., 2010, 54811, 54814) (criminal liability established for offenses based on international instruments that clearly require criminal liability for juridical entities)

[8] See also Jan Wouters & Leen De Smet, De strafrechtelijke verantwoordelijkheid van rechtspersonen voor ernstige schendingen van internationaal humanitair recht in het licht van de Belgische genocidewet 5-6, Katholike Universiteit Leuven, Faculteit Reichtsgleerheid, Instituut voor Internationaal Recht Working Paper Nr. 39 (Jan. 2003) (Belgian law would recognize criminality of legal entities for international crimes); Criminal Justice Act, 1988, c. 33, § 134 (U.K.) (any "person" acting in official capacity, or at the instigation of or with the consent and acquiescence of a public official or person acting official capacity may be criminally liable for torture); C. Pén. arts. 121-2 & 222-1 (Fr.) (French law holds legal entities criminally liable for acts committed on their behalf by their legal representatives; all torture is a criminal offense); Criminal Code 1995, §§ 12.1(2) (Aus.) ("A body corporate may be found guilty of any offence, including one punishable by imprisonment.") & 274.2 (establishing crime of official torture); International Crimes Act, 2008, c. 16, §§2, 6 (Kenya) (defining "person" to include "a company or association or body of persons

also, e.g., *R. v Zardad* Judgment and rulings pursuant to first preparatory hearing, Case No. T2203 7676; ILDC 95 (UK [2004) (U.K. High Court, 2005) (recognizing that Section 134 of the Criminal Justice Act 1988 was enacted to create criminal liability for torture and that the statutory language "closely follows the wording of Article 1 [of the CAT]").

That there is universal criminal jurisdiction over torture is evidenced by the "extradite or punish" provisions in the CAT, Articles 5, 7 and 8. Further, as Justice Breyer noted in his concurrence in *Sosa v. Alvarez-Machain*, "universal criminal jurisdiction" includes jurisdiction over torture and "necessarily contemplates a significant degree of civil tort recovery as well." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 762-63, 124 S. Ct. 2739, 2783, 159 L. Ed. 2d 718 (2004) (Breyer, J., concurring in part and concurring in the judgment).

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corporate or unincorporated," and establishing criminal penalties for a "person" who commits genocide, crimes against humanity or war crimes); Schweizeres Strafgesetzbuch [StGB], Code pénale suisse [CP] Dec. 21, 1937, SR 311.0, arts. 102, 264-264h (Switz.) (establishing criminal liability of legal persons for all felonies and misdemeanors, where such liability cannot be attributed to a natural person due to the "inadequate organization" of the legal person, and criminalizing genocide, war crimes, and crimes against humanity); International Criminal Court Act, Act 11 of 2008, arts. 7-9 (Uganda) (establishing criminal offense where a "person" commits genocide, crimes against humanity, or war crimes); Interpretation Act, 1976, ch. 3, §2 (Uganda) (definition of "person" includes "any company or association or body of persons corporate or unincorporated").

2. The CAT and ICCPR require civil remedies for torture victims, which States provide either through civil remedies in a criminal process or a freestanding civil remedy.

The treaties' requirements include providing civil remedies. CAT arts. 2 and 14; ICCPR arts. 2 and 7. The Committee against Torture expressly contemplates civil proceedings and reparations in addition to criminal proceedings. Indeed, if domestic law requires the exhaustion of criminal proceedings before civil compensation can be sought, "then the absence or delay of those criminal proceedings constitute a failure on behalf of the State party to fulfill its obligations under the Convention." CAT Draft General Comment on article 14, ¶ 24.

Countries' domestic laws provide for various types of civil remedies. The form follows the trend in domestic criminal liability of juridical persons, as well as the country's attitude towards corporate legal personality in general.

Under the Netherlands' civil law, for example, corporations have legal personality, and consequently, claims can be filed against them. International Commission of Jurists, *Access to Justice: Human Rights Abuses Involving Corporations – The Netherlands*, (2010) at 9, *citing* Burgerlijk Wetboek (Bw) [Dutch Civil Code], art. 2:3. Under the Dutch Civil Code, a person who commits a tortious act must repair the harm suffered by the other person. *Id.*, *citing* Burgerlijk Wetboek (BW) [Dutch Civil Code], art. 6:162(1). Unlawful acts are

defined as: the violation of a right, an act or omission violating a statutory duty or a rule of unwritten law pertaining to proper social conduct. The violation of a right refers to specific rights of the person harmed, such as the rights to life, physical integrity and freedom. *Id.* at 9-10, *citing* A.G. Castermans and J.A. van der Weide. *De juridische verantwoordelijkheid van Nederlandse moederbedrijven voor de betrokkenheid van dochters bij schendingen van fundamentele, internationaal erkende rechten.* Report for the Ministry of Economic Affairs, Leiden (15 December 2009) at 17 (describing legal liability of Dutch parent companies for involvement of subsidiaries in violations of internationally recognized human rights).

In many countries, civil liability applies to juridical persons as a subsidiary of criminal liability. The Spanish Penal Code, for example, recognizes civil liability for juridical persons for the crimes committed by their employees, agents, representatives, and managers in carrying out their professional duties. Codigo Penal (Penal Code) [C.P.] art. 120. This accords with the general principle in Spanish law that criminal liability carries with it the obligation to reparation, restitution, and material and moral damages. C.P. art. 110.[9]

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[9] Spanish law recognizes "illicit associations" that have been constituted to commit a crime; that promote the commission of crimes, discrimination or hatred; those that employ violent means or that are paramilitary organizations. C.P. art. 515 (Sp.). The directors of these organizations may be prosecuted, *id.* art. 517, and the organizations themselves fined, suspended, disbanded, among other sanctions. *Id. art.* 520

Some countries, like France, allow victims to participate in criminal proceedings as *parties civiles*, allowing their claims for damages and in some cases, restitution, to be joined against any defendant.[10] Fafo Report on Private Sector Liability, p. 23.

Numerous countries apply ordinary tort liability against legal entities for harms caused by torture. In 15 of 16 countries surveyed recently, ordinary common law claims or civil law delicts can be brought against corporate entities for violations of international criminal and international humanitarian law. Fafo Report on Private Sector Liability p. 22.

In the United Kingdom, for example, where there is no specific civil cause of action for torture, a corporation may be held responsible for torture using common law torts like assault and battery. *Guerrero and others v Monterrico Metals plc and another*, [2009] EWHC 2475 (QB); [2009] All ER (D) 191 (Oct) 16 October 2009 ("The alleged facts as to Monterrico's

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(referring to C.P. arts. 129, which refers to sanctions listed in C.P. art. 33.7). Spain has also ratified the Rome Statute of the International Criminal Court. War crimes and crimes against humanity, including torture, are criminalized under Ley Orgánica 15/2003, de 25 de noviembre.

[10] Italian law also provides for the participation of victims in criminal prosecution, Codice di procedura penale [C.p.p.] art. 90, para. 1., and gives them the right to include civil claims in the criminal prosecution. *Id.* art. 74. Italy, which is party to the Rome Statute, recognizes a form of quasi-criminal administrative liability for legal persons in whose interest or for whose benefit a representative or agent committed a crime. Decreto Legislativo June 8, 2001, Gazz. Uff. n.140, June 19, 2001..

responsibility and participation in the alleged brutality against the protesters would appear to be sufficient to found a cause of action.)

Further, as a State Party to the ECHR, the United Kingdom incorporates its international obligations into its domestic law through the Human Rights Act 1988. Section 8(1)-(4) creates remedies for acts of public authorities, and instructs the domestic courts to consider "the principles applied by the European Court of Human Rights in relation to the award of compensation under Article 41 of the Convention." Further, the HRA expressly authorizes courts to hear actions against "public authorities," which includes some non-state actors. *HRA* at § 6(3)(b), (5) (defining a public authority as "any person certain of whose functions are functions of a public nature," but excluding private acts).[11]

There is no barrier in Germany to suing a legal entity for damages, provided the entity has a seat or place of establishment in Germany. Zivilprozessordnung [ZPO] [Code of Civil Procedure Statute] Dec. 5, 2005, Bundesgesetzblatt, Teil I [BGBl. I] §§ 17, 21. (F.R.G.) This would include damages for torture.

Another form of civil liability for juridical persons is found in the constitutional law of various countries such as South Africa and New Zealand. There is a

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[11] *See, e.g., Mosley v. News Group Newspapers Ltd.*, [2008] EWHC 1777 (QB) (upholding a claim for breach of privacy against a private corporation, finding the HRA requires U.K. courts to interpret its privacy law in light of the European Convention).

constitutional right in South Africa to "appropriate relief" for violations of the Bill of Rights, provisions of which bind juridical entities directly where "applicable, taking into account the nature of the right and the nature of any duty imposed by the right." Constitution of the Republic of South Africa (1996) arts. 8(2) & 38. The Bill of Rights includes the right not to be tortured or subjected to a deprivation of physical integrity, id. art. 12.1.d, and the South African courts have found that constitutional damages may be available when appropriate for violations of the Bill of Rights. *See, e.g.*, *Fose v Minister of Safety and Security*, 1997 (3) SA 786 (CC) ¶ 1, 57, 59 (authorizing constitutional remedy of reparations for torture and noting that the South African constitution guarantees certain rights "applicable to relationships governed by 'private law'.") Victims of torture (and others acting in their name) have standing before the Constitutional Court. Constitution art. 38.

The New Zealand Bill of Rights Act 1990 includes the right not to be tortured (sec. 9), and its provisions apply for the benefit of all legal and natural persons. Sec. 29. The Act also applies to any acts by the government, any person, *or body*, performing a public function, power or duty conferred or imposed by or pursuant to law (sec. 3, emphasis added). Further, the right to justice protected in section 27 confers standing on individuals to bring civil proceedings before the courts.

In a majority of Latin American countries, the *amparo* action (or *tutela* in Colombia) provides a judicial mechanism to redress violations of human

rights, civil rights and other freedoms, in addition to civil and monetary remedies.[12]

This provision of a domestic remedy for vindication of substantive rights is consistent with Article 25 of the ACHR. That article calls for signatory countries to provide citizens with a right to "effective recourse before a competent court or tribunal for the protection against acts that violate his fundamental rights recognized by the constitution or laws of the State or *by this Convention* [emphasis added]." Art. 25, ACHR (1969); *See also* Inter-American Court Advisory Opinion OC-8/87, of January 1987, para. 32.

While the source (constitutional or legislative) for the *amparo* and procedures for its implementation vary, in many countries, *amparo* actions are permitted against juristic persons and private

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[12] The *amparo* action has existed in Latin America at least since the 19th century, and originated as a mechanism akin to a "writ" that provided for judicial protection (often injunctive) of fundamental rights—usually those rights protected by the state's constitution. During the latter half of the 20th century, Latin American states began to expressly stipulate that the amparo could also provide a mechanism for redress of violations of internationally protected human rights. *See* Brewer-Carias, Allan R. "Mecanismos Nacionales de Proteccion de Los Derechos Humanos," (2005) Instituto Interamericano de Derechos Humanos, San Jose, Costa Rica, at 84-85. Available: http://www.iidh.ed.cr/BibliotecaWeb/Varios/Documentos/BD_157895943/Mecanismos%20Nacionales%20de%20Proteccion.pdf?url=%2FBibliotecaWeb%2FVarios%2FDocumentos%2FBD_157895943%2FMecanismos+Nacionales+de+Proteccion.pdf.

entities, as well as individuals and public actors.[13] This is so because

> the constitutional judicial protection guaranteed in the American Convention by means of the *amparo*, is against any act, omission, fact or action that violates human rights and, of course, which threatens to violate them, without specifying the origin or the author of the harm or threat. This implies that the recourse of "*amparo*" can be brought before the courts against any persons in the sense that it must be admitted not only against the State or public authorities, but also against private individuals and corporations.

Brewer-Carías, *Some Aspects of the "Amparo" Proceedings* at 20.

As an example, Article 43 of the Constitution of Argentina provides that any person may file a proceeding against any act or omission of public authorities or individuals for the protection of rights

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[13] Brewer-Carias, Allan R., Some Aspects of the "Amparo" Proceeding in Latin America as a Constitutional Judicial Mean Specifically Established for the Protection of Human Rights, paper presented at the Colloquium in International and Comparative Law, University of Maryland School of Law, Baltimore, October 2007, at page 10. Available http://www.allanbrewercarias.com/ Content/449725d9-f1cb-474b-8ab2-41efb849fea2/Content/I,1,%20965.%20Some%20aspects%20of%20the%20Latin%20American%20Amparo%20Proceeding.%20University%20of%20Maryland,%20Oct.%202007.pdf.

recognized by the constitution, international human rights treaties, or statutes. *See* Article 43 of the Constitución Nacional de Argentina. The Supreme Court of Argentina established over 50 years ago that the term "individuals" here includes corporations. *Samuel Kot*. Judgment of Sept. 5, 1958, S.R.L. *Samuel Kot*, CSJN, 241 Fallos 291 (1958) (Arg.) (*amparo* action against a textile company, Kot S.R.L, for violations of constitutionally and internationally protected labor rights).

Similarly, Colombia has a vigorous *tutela* procedure[14] that has been frequently invoked against corporations for the protection of human and fundamental rights. *See Defensor del Pueblo, doctor Jaime Córdoba Triviño*, Constitutional Court of Colombia in plenum, February 3, 1997; Constitution, Art. 93 (1991) (Colombia) (Constitutional Court of Colombia, 1997) (*tutela* action filed against Occidental Petroleum for violations of rights protected by international treaty) [15] Article 86 of the

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[14] Since 1991, more than 1.5 million *tutela* actions have been brought in Colombia for violations of human rights. *See* Rodrigo Uprimny Yepes, "La constitución y la protección judicial de los derechos," Dejusticia, Julio 23 de 2006, available: http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB0QFjAA&url=http%3A%2F%2Fwww.dejusticia.org%2Findex.php%3Fmodo%3Dinterna%26tema%3Destado_de_derecho%26publicacion%3D139&ei=FmrvToe3No3jggfM7s3hCA&usg=AFQjCNHCDPD1hGNgz7ZLjsqgGI-zrKXb0Q&sig2=eoRVSJ5yyhfRFwf3bmh6CQ.

[15] *See also* Corte Constitucional Sentencia T-247/10 (2010) (tutela action against corporation Ecopetrol S.A for violation of right against discrimination); Corte Constitucional Sentencia T-083/10 (2010) (tutela action against the corporation Sociedad

Colombian Constitution (1991) permits *tutela* actions against private or juridical entities, "entrusted with providing a public service or whose conduct may affect seriously and directly the collective interest" or when the petitioner finds himself placed "in a state of subordination or vulnerability" by the private actor.[16]

Article 12 of the Colombian Constitution explicitly recognizes the prohibition against torture as a fundamental right. *See* Constitution of Colombia (1991) at Title II, Chapter 1, Concerning Fundamental Rights, Art. 12, Because clause 9 of Decreto N° 2.591 de 1991 (art. 42), explicitly permits *tutela* actions against private parties, including corporations, for violations of fundamental rights, torture should also be actionable.

The Bolivian Constitution (2009), article 128, also permits an *amparo* action "against illegal or undue acts or omissions, of public officials or of individual *or collective actors* that restrict, deny or threaten to restrict or deny the rights and guarantees of the person recognized by the Constitution and laws."

Portuaria Regional de Buenaventura y COOPORTUARIA S.A. for violation of labor and due process rights);

[16] Decreto N° 2.591 de 1991 (clause 9 of art. 42); Corte Constitucional Sentencia T-166/09 (2009) (tutela action brought against a church for violation of fundamenta right of to personal privacy)(interpreting Decreto 2.591; *Accord* Corte Constitucional, Sentencia T-495-10 (2010) (action against a private party for violations of fundamental right to live with dignity, and to decent housing). Subordination" been interpreted broadly by the Constitutional Court to include situations in which there is a "factual impossibility of a defense against the unjust aggression of a private party."

Constitution, Art. 128 (2009) (Bolivia) (emphasis added).

Other countries that permit *amparo* suits against private entities include Chile, Constitution, Art. 20 (1980) (Chile), Ecuador,[17] the Dominican

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[17] Constitution, Art. 88 (2008) (Ecuador) (*amparo* actions permissible against private parties if theye parties cause "severe damage" or if the affected person is in a status of subordination, defenselessness or discrimination.

Republic,[18] Paraguay,[19] Peru,[20] Uruguay,[21] Venezuela,[22] Guatemala and Costa Rica.[23]

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[18] *See Productos Avon S.A. case*, February 24, 1999, Dominican Republic; Article 1, Ley 437-06, Dominican Republic.

[19] Art. 134 (1992) (Paraguay) (*amparo* action permissible against private parties for violations of rights secured by the constitution or by law). The *amparo* is also regulated by the law "Ley 1337/1988" in the Código Procesal Civil.

[20] Constitution, Art. 200 (1993) (Peru) (permits *amparo* action against private actors. Human rights treaties can be claimed in *amparo* actions because Article 55 of the Peruvian Constitutional grants legal status to international treaties: *see also* Sentencia 03343-2007-AA-Tribunal Constitucional Perú (2009) (action against Occidental Petroleum in Peru for violations of the "right to life" and the "right to a healthy environment"); Sentencia 4635-2004-AA/TC-Tribunal Constitucional Perú (2006) (workers brought suit against Southern Peru Copper corporation for violations of human rights protected by international treaties).

[21] Ley No. 16.011 de Amparo (1988) (Uruguay) (permits *amparo* actions against "any act, omission or event of state or parastatal authorities, as well as private actors who currently or imminently injure, alter or threaten to restrict, in any manifest illegitimacy, rights and freedoms expressed or implied by the Constitution.").

[22] Ley Orgánica de Amparo sobre Derechos y Garantías Constitucionales (1988) (Venezuela) (permits *amparo* actions for any "event, act or omission caused by citizens, legal persons, groups or private organizations that have violated, violate or threaten to violate any of the securities or rights" under the law.).

[23] *Ley de Amparo*, Art. 9 (1988) (Guatemala) permits suits against private entities that must, by law, register themselves by legal mandate or whose legal existence is otherwise recognized by law, such as political parties, associations, companies unions, cooperatives and other similar entities).

B. Regional law and customary international law require States to provide remedies for abuse, including torture, including remedies against entities.

1. The Inter-American Human Rights system has established the right to an effective remedy, and the absence of such a remedy is itself a violation of the Convention.

The American Convention on Human Rights, to which the United States is a signatory,[24] requires States Parties to provide domestic legislation giving legal effect to Convention rights. *See,* ACHR, Art. 2 . Torture is strictly prohibited by Articles 5(2) and 27. As noted above, Article 25 of the ACHR calls for States Parties to provide prompt and effective

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In Costa Rica, "subjects of private law" (interpreted as companies or individuals) may be proper defendants in *amparo* actions when they provide public services or find themselves in positions of power where common remedies prove insufficient for guaranteeing and protecting constitutional rights and liberties those and duties recognized by controlling international law in Costa Rica. Constitution, Art. 48 (1949 (Costa Rica); *Ley de la Jurisdicción Constitucional,* Art. 57 (1989) (Costa Rica).

[24] Although it has not ratified the ACHR, as a signatory, the U.S. "is obliged to refrain from acts which would defeat the object and purpose of [the] treaty." Vienna Convention on the Law of Treaties, Article 18, 1155 U.N.T.S. 331, T.S. No. 58 (1980), 8 I.L.M. 679 (1969).

judicial recourse to victims of violations of the rights under State law or the Convention. The ACHR asserts that State Parties undertake to "develop the possibilities of judicial remedy" and to ensure that the competent authorities shall enforce such remedies when granted," but does not direct the States as to how to implement the remedies.

As further evidence of the universality of the obligation to provide remedies, the European Convention on Human Rights unequivocally prohibits torture, Article 3 and 15(2) (no derogation permitted), and requires State Parties to provide effective domestic remedies for violations of the rights contained within Article 13 of the European Convention.

In the same way, the Inter-American Court on Human Rights recognizes that State Parties are responsible for providing domestic legislation giving legal effect to rights under the ACHR. *Velásquez Rodríguez Case*, Judgment of June 26, 1987, Inter-Am. Ct. H.R. (Ser. C) No. 1 (1987) ("The lack of effective domestic remedies renders the victim defenseless and explains the need for international protection."); *see also, Caesar v. Trinidad and Tobago*, Judgment of March 11, 2005. Inter-Am Ct. H.R., ¶2 (Ser. C) No. 123 (2005) (State Party in contravention of the ACHR for failing to "give domestic legal effect to the rights guaranteed under [certain articles] of the ACHR"); *accord, Cantoral Benavides Case*, Judgment of August 18, 2000, Inter-Am Ct. H.R. (Ser. C) No. 69 (2000) (holding the State violated numerous provisions of the ACHR).

III. Remedies against all entities that support or participate in torture are necessary for the effective eradication of torture worldwide.

States are required to prevent, prosecute and punish, and redress torture in order to meet their obligations under the CAT, Arts. 2 (prevention), 4-7 (punishment), 13-14 (redress). Providing an effective civil remedy to victims of torture and cruel, inhuman, and degrading treatment serves all three of these goals, as it compensates and rehabilitates victims, financially penalizes perpetrators, and deters future abuse by raising the cost of violations. Immunity for corporations and other entities would undermine all three aspects of the state obligation to provide civil remedies by allowing torturers to hide assets and escape accountability merely by collectivizing or privatizing their operations.

A. Civil remedies fulfill States' requirement to take measures necessary to prevent, punish and redress torture.

As the Human Rights Committee has noted, a state does not fulfill its obligations under the ICCPR unless it takes steps to "prevent, punish, investigate or redress" the harms caused by private persons and entities, singling out torture as a particular area in which states have an obligation to prevent abuse. HRC Gen. Cmt. No. 31. The reports of the U.N. Special Rapporteur on Torture to the Human Rights Council consistently emphasize that only a victim-centered perspective that allows for adequate and

integrated compensation and rehabilitation for victims and their families can successfully fulfill international standards on redress and reparation. See, e.g., Juan E. Méndez, Report by the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment ¶¶ 47-49, submitted to the Human Rights Council, U.N. Doc. A/HRC/16/52 (Feb. 3, 2011); Statement of Juan E Méndez, Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 2, delivered to the Human Rights Council, 16th Sess., agenda item 3 (Mar. 7, 2010).

B. Remedies against entities are necessary for the effective prevention of torture, because deterring torture requires punishment of all actors that contribute to its commission.

As a general matter, international human rights law requires the provision of remedies against entities, including for participation in torture. The Human Rights Committee, charged with interpreting the ICCPR, has declared that States must "provide effective remedies" and "redress the harm caused . . . by private persons *or entities*." HRC Gen. Cmt. No. 31, ¶ 8 (Mar. 29, 2004).

To provide effective redress and reparation, domestic civil remedies purporting to implement a state's international obligations regarding torture must provide for the liability of entities that are ultimately responsible. Thus, the Basic Principles and Guidelines on the Right to a Remedy, which have been adopted by the U.N. General Assembly, envision reparations by legal persons and other entities where

they are found to be liable for human rights abuses. *See* Basic Principles, *supra* at note 14..

Regrettably, instances in which collective entities have subjected natural persons to torture under color of state law are not infrequent. In fact, groups – incorporated or otherwise – may be particularly well-suited to carrying out state-sponsored torture due their ability to pool and marshal assets and increase the geographical and physical reach of their sponsors. These groups may take many different forms. Torturers may act on behalf of entities like the Serb forces during the Bosnian War, which have many of the attributes of states, including the control of territory, the formation of governing bodies, and the organization of armed forces, but which espouse a policy and practice of torture. *See, e.g.*, *Prosecutor v. Kunarač*, Case No. IT-96-23 & IT-96-23/1-T, Judgment, ¶¶ 570-79 (Feb. 22, 2001). State-sponsored terrorist groups like Hezbollah have acquired funds and material resources as a collectivity in order to carry out the political aims of a sovereign government, and have benefited from acts of torture and extra-judicial killing carried out by individual operatives.[25] It is well documented that Colombian government forces have cooperated with private paramilitary "self-defense groups" that have

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[25] *See generally, Taylor v. Islamic Republic of Iran*, No. 10-cv-844, 2011 U.S. Dist. LEXIS 96238 (D.D.C. Aug. 29, 2011) (Hezbollah founded and supported by Iran in order to carry out, *inter alia*, extrajudicial killings); *see also Stern v. Islamic Republic of Iran*, 271 F. Supp. 2d 286, 298-99 (D.D.C. 2003) (Hamas' suicide bombing attack would have been impossible "without . . . [financial] support and training" from Iran).

been responsible for a significant proportion of the acts of torture and ill-treatment in that country's civil war.[26] And, unfortunately, some corporations have allegedly aided and abetted official torture as an illegitimate tool to advance their business interests, including Unocal Corp. in Myanmar, *see John Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002) (finding evidence of complicity), Royal Dutch Petroleum in Nigeria, *see Wiwa v. Royal Dutch Petroleum Co.*, 626 F. Supp. 2d 377 (S.D.N.Y. 2009); Talisman Energy in Sudan, *see Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003).

As a practical matter, it is unlikely that a victim of torture by a collective entity will be able to obtain the complete remedy required by the CAT if her civil action is only against the particular natural persons who physically committed the act of torture. A victim is more likely to be obtain enforceable compensation against an entity than a single natural person for the range of injuries specified by the Basic Principles, which include physical and mental harm; lost employment, education, and other social benefits; material damages and loss of earnings and earning

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[26] See Joint report of the U.N. Special Rapporteur on the question of torture, Sir Nigel S. Rodley, and the Special Rapporteur on extrajudicial, summary or arbitrary executions Mr. Bacre Waly Ndiaye, submitted pursuant to Commission on Human Rights resolutions 1994/37 and 1994/82, ¶¶ 10, 24, 36, 38, 42, 43, 46, 60, 65, 69, 72, 103, 104, 105, submitted to the Commission on Human Rights, U.N. Doc. E/CN.4/1995/111 (Jan. 16, 1995); Manfred Nowak, Report of the Special Rapporteur on torture, Addendum, ¶¶ 101, 102, 152, submitted to the Human Rights Council, U.N. Doc. A/HRC/7/3/Add.2 (Feb. 18, 2008).

potential, moral damages, and past and future professional services. CAT, Basic Principles, *supra* note 14, ¶ 20-21. Absent corporate liability, an entity could shield the ill-gotten gains of torture from a civil remedy merely by pooling its assets and holding them collectively. While a human torturer may flee the jurisdiction to evade legal process, an entity with assets and operations in a given country is much less likely to be able to do so. Moreover, precluding a civil remedy against an entity that abets or participates in torture is inconsistent with the idea of integrated, victim-centered reparation and rehabilitation. That would include identification of the responsible parties and a full truth-telling of the abuses as part of the victim's process of overcoming trauma and reintegrating into society. *Id.* art. 22; Méndez Statement, *supra* at 33.

A civil remedial scheme that excludes liability for collectivities also inadequately punishes and deters torture. Civil remedies can be punitive as well as compensatory in that they impose monetary sanctions on a liable defendant–particularly in countries that authorize punitive damages like the United States. *See Dodge v. Islamic Republic of Iran*, CIV.A.03 252 TPJ, 2004 WL 5353873 (D.D.C. Aug. 25, 2004($2,920,000.00 punitive damages award against Iran for instigating Hezbollah to take hostage, an action that served Iranian objectives).

Further, immunity vitiates the deterrent effect of civil liability, violating the principle that an effective remedy entails guarantees of non-repetition. CAT, Basic Principles, *supra* note 14, ¶ 23. For example, in the mid-1990s, many illegal Colombian paramilitary either reorganized as legal corporate

entities known as *convivires* or began to work closely with *convivires*, which were able to legally purchase weapons and funnel money to the illegal groups. The *convivir* thus became the legitimate veneer for paramilitary activity, an essential part of the culture of impunity that allowed those ultimately responsible to organize forces to commit consolidate their power and commit atrocities again and again. See Maria Clemencia Ramirez, Between the Guerillas and the State: The Cocalero Movement, Citizenship, and Identity in the Colombian Amazon 51 (2011); Amnesty Int'l, Colombia: The Paramilitaries in Medellín: Demobilization or Legalization?, AI Index AMR 23/019/2005, Aug. 31, 2005; see also documents archived at National Security Archive, "Documents Implicate Colombian Government in Chiquita Terror Scandal," (Mar. 29, 2007), at http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB217/index.htm.

C. Exempting entities such as corporations or unincorporated groups from liability for torture is akin to an impermissible amnesty.

By immunizing the financial and intellectual authors of torture, exempting collective entities from liability could serve, at best, as an encouragement to future torture by allowing torturers to hide assets in various forms of collectivity, and as a form of amnesty for torture.

International law prohibits amnesty for torture. The Human Rights Committee has stated:

> Amnesties [for torture] are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their

> jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible.

HRC, Gen. Cmt. No. 20, ¶ 15. Similarly, the Committee against Torture interprets amnesties as inconsistent with Article 14. Draft Gen. Cmt. on art. 14, ¶ 36. Yet exempting from liability a category of entities otherwise recognized by the law – entities that have sometimes had a significant role in perpetrating, encouraging, and funding torture, and that hold significant assets – would be akin to just such an impermissible amnesty.

CONCLUSION

For these reasons, this Court should find the Torture Victim Protection Act provides a remedy for torture against legal entities and other defendants who are not natural persons, and reverse the court of appeals judgment below.

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December 21, 2011

AMICUS CURIAE BRIEF

RECORD AND BRIEFS

Nos. 10-1491; 11-88

Supreme Court, U.S.
FILED
DEC 21 2011
OFFICE OF THE CLERK

In The
Supreme Court of the United States

ESTHER KIOBEL, individually and on behalf of her late husband, DR. BARINEM KIOBEL, et al.,
Petitioners,
v.
ROYAL DUTCH PETROLEUM CO., et al.,
Respondents.

ASID MOHAMAD, et al.,
Petitioners,
v.
PALESTINIAN AUTHORITY, et al.,
Respondents.

On Writs Of Certiorari To The United States Courts Of Appeals For The Second And District Of Columbia Circuits

BRIEF OF AMICI CURIAE NUREMBERG SCHOLARS OMER BARTOV, MICHAEL J. BAZYLER, DONALD BLOXHAM, LAWRENCE DOUGLAS, HILARY EARL, HON. BRUCE J. EINHORN, RET., DAVID FRASER, SAM GARKAWE, STANLEY A. GOLDMAN, GREGORY S. GORDON, KEVIN JON HELLER, MICHAEL J. KELLY, MATTHEW LIPPMAN, MICHAEL MARRUS, FIONNUALA D. NÍ AOLÁIN, KIM CHRISTIAN PRIEMEL, CHRISTOPH SAFFERLING AND FREDERICK TAYLOR IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Amici Curiae – listed in the attached Appendix – comprise academicians from three disciplines: law, history, and political science, and have particular knowledge about Nuremberg-era jurisprudence and the international trials that took place in occupied Germany in the aftermath of the Second World War. Given the singular importance of Nuremberg-era jurisprudence in the development of international law,[2] it is particularly crucial that this Court understand how international law was applied to German corporations in the aftermath of Nazi Germany's unconditional surrender in May 1945, and how these corporations were held accountable for violations of international law through multiple sanctions, including dissolution, reparations and other punitive actions. The majority opinion in *Kiobel v. Royal Dutch*

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[1] This brief is submitted pursuant to Supreme Court Rule 37 in support of Petitioners. The parties have consented to the filing of this brief, and such consents have been lodged with the Court. No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No persons other than the Amici or their counsel made a monetary contribution to this brief's preparation or submission.

[2] For example, when the International Law Section of the American Bar Association chose to commemorate the 60th anniversary of the Nuremberg trials it called its program "Nuremberg and the Birth of International Law." *Available at* http://apps.americanbar.org/intlaw/nuremberg05.doc.

Petroleum[3] is both factually and legally incorrect in stating that the Nuremberg-era precedent stands for the proposition that corporations are not bound by international law and cannot be held accountable for violations of international law.

Because the analysis of the history of the post-World War II treatment of corporations and organizations under international law may be relevant to the issues raised in the companion case, ***Mohamad v. Rajoub***, No. 11-88, Amici submit this brief in that case as well.

SUMMARY OF ARGUMENT

An accurate understanding of the Nuremberg-era jurisprudence and Nuremberg trials is critical to the question of whether corporations and organizations may be held liable under international law. At the various trials conducted by the Allies between 1945 and 1948 at the Palace of Justice in Nuremberg and in other courtrooms throughout occupied Germany only German industrialists, and not the German corporations themselves, were criminally prosecuted. However, the Allied Control Council – the international body governing occupied Germany and issuing Control Council Law No. 10 under which the Nuremberg Military Tribunals were held between 1946 and

[3] 621 F.3d 111 (2d Cir. 2010), *reh'g and reh'g en banc denied*, 642 F.3d 268 (2d Cir. 2011), 642 F.3d 379 (2d Cir. 2011).

1949 – deployed a range of remedial measures to hold juristic persons, including corporations, accountable for violations of international law. Such measures included the dissolution of corporations and the seizure of their assets. Indeed, even before the first Nuremberg trial began, the Allied Control Council had already dissolved a number of German corporations, including most prominently the world's largest chemical corporation *Interessengemeinschaft Farbenindustrie Aktiengesellschaft* ("I.G. Farben"), and seized their assets. As a result, when the international trial of the Farben defendants took place pursuant to Control Council Law No. 10, I.G. Farben had already suffered corporate death under international law pursuant to Control Council Law No. 9.

The entire point of the trials that took place in Courtroom 600 of the Nuremberg Palace of Justice in the American zone, and in courtrooms of the other zones throughout occupied Germany, pursuant to Control Council Law No. 10 was to put natural persons in the dock. It was to show that Nazi leaders and other perpetrators, including German industrialists, could be held criminally responsible under international law regardless of rank or position. In putting only natural persons in the dock, the Allied prosecutors did not intend to create an international law norm that corporations are immune. In fact, the judicial actors at Nuremberg specifically recognized that international law permitted the punishment of corporations, but chose not to judicially prosecute for political and economic reasons. As a result, punishment of

German corporations under international law took place outside of the courtroom. The absence of criminal penalties imposed by an international judicial tribunal against German corporations is more appropriately understood as a choice to sanction such corporations through other international law mechanisms, rather than through a criminal trial – and not as a rejection of the international law authority to hold corporations accountable.

The Control Council operated as a government of occupation, whether under the customary international law principle of *debellatio* or pursuant to the customary international law of occupation, as reflected in the 1907 Hague Regulations provisions. The norms which the Allies applied were anchored in international law. This was as true of the Allied occupation courts, such as the International Military Tribunal and the Nuremberg Military Tribunals, as it was of the Allied Control Council laws and directives. Whether at the Palace of Justice courthouse in Nuremberg or at the Allied Control Council headquarters in the Kammergericht courthouse in Berlin, the Allied Control Council officials and Allied judges were all applying international law.

The erroneous analysis of the *Kiobel* majority concludes that "[n]o corporation has ever been subject to *any* form of liability (whether civil, criminal, or otherwise) under the customary international law of human rights." *Kiobel*, 621 F.3d at 148. In reaching this decision, the majority narrowly focused on the criminal trials and ignored other actions taken under

customary international law against corporations and organizations outside the courtroom. The impression left by the majority opinion in *Kiobel* is an historically inaccurate conclusion that what came out of what we label in shorthand as "Nuremberg-era jurisprudence" is a rule that corporations are immune under international law. We respectfully submit that the Founders of Nuremberg and those working with them would have been dismayed by this conclusion.

ARGUMENT

I. NUREMBERG-ERA JURISPRUDENCE SPECIFICALLY IMPOSED SANCTIONS ON NATURAL PERSONS, ORGANIZATIONS AND CORPORATIONS FOR VIOLATIONS OF CUSTOMARY INTERNATIONAL LAW

An understanding of Nuremberg-era jurisprudence and its application to corporations must begin with an understanding of the broad program enacted by the Allies after the occupation of Germany. The Allies' program to govern Germany for the period immediately following the cessation of hostilities contained three components: what to do with the German state upon defeat of the Third Reich; what to do with natural persons and organizations who committed crimes; and what to do with the German economy and its corporations.

With regard to the defeated German Reich, the Allies first occupied the country by dividing it into four zones and, later, as a consequence of the Cold War, into two states: the Federal Republic of Germany, created out of the Western zones, and the German Democratic Republic, created out of the Soviet zone. With regard to the natural persons and organizations, the outline of what to do with the Reich leaders and other perpetrators of "atrocities, massacres and executions" was first set out in the Moscow Declaration of November 1, 1943,[4] while the war was still ongoing, and then confirmed by the London Charter of August 8, 1945, after Nazi Germany's unconditional surrender.[5] The Moscow Declaration left open the decision of what to do with the Reich leaders (including Hitler) until the conclusion of hostilities, and the London

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[4] "At the time of granting of any armistice to any government which may be set up in Germany, those German officers and men and members of the Nazi party who have been responsible for or have taken a consenting part in . . . atrocities, massacres and executions will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries. . . . German criminals whose offenses have no particular geographical localization . . . will be punished by joint decision of the government of the Allies." Statement of Atrocities, signed by President Roosevelt, Prime Minister Churchill and Premier Stalin, Moscow, November 1, 1943, 3 Bevans 816, 834 Dep't St. Bull. (Nov. 6, 1943).

[5] Charter of the International Military Tribunal – Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis ("London Charter"), 59 Stat. 1544, 82 U.N.T.S. 279 (Aug. 8, 1945).

Charter codified the decision of the Allies to try the so-called major war criminals (now without Hitler, who committed suicide) before an international military tribunal constituted at Nuremberg. The third issue that faced the Allies upon Nazi Germany's defeat was what to do with the major German corporations that had participated in war crimes and other violations of international law.

The Allies created the quadripartite Control Council to translate its policies into law.[6] Under the Control Council was the Coordinating Committee, which was assisted by ten directorates serving as functional specialists for the Coordinating Committee, including the Finance Directorate, Legal Directorate, Reparation Directorate, and Restitutions Directorate.[7] Some writers at the time noted that the directorates functioned "in a manner similar to the Congressional committees

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[6] *See* Agreement on Control Machinery in Germany, November 14, 1944, *available at* http://docs.fdrlibrary.marist.edu/psf/box32/t298f04.html; Eli E. Nobleman, *Quadripartite Military Government Organization and Operations in Germany*, 41 Am. J. Int'l. L. 650, 651 (1947) (stating that the supreme governing machinery for Germany is the Allied Control Authority, composed of the Control Council, the Coordinating Committee, the Control Staff and the Allied Secretariat). The Control Council was composed of Commanders-in-Chief of the Armed Forces of the United States, United Kingdom, Union of Soviet Socialist Republics, and France, and acted "on instructions from their respective governments with respect to all matters affecting Germany as a whole." *Id.* at 651.

[7] *Id.* at 651-2.

in the United States."[8] The Control Council and Coordinating Committee were provided with the "means of legislative action," including laws "on matters of general application," orders to communicate Control Council requirements, and directives used to "communicate policy or administrative decisions of the Control Council."[9] With deterioration in relations with the Soviet Union, the three-power Allied High Commission, comprised of representatives of the United States, the United Kingdom and France, replaced in 1949 the four-power Control Council for the Western occupied zones, and the Federal Republic of Germany began to be created out of the Western zones. Under occupation, related laws were also issued for Germany in the different Allied zones, sometimes known as "zonal legislation."

In Part I, we describe how international law was applied in occupied Germany. As we explain in Section A, the Control Council's actions in governing

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[8] *Id.* at 653.

[9] Control Council Directive No. 10, *Control Council Methods of Legislative Action* (Sept. 2, 1945), *reprinted in* 1 Enactments and Approved Paper of the Control Council and Coordinating Committee 95, *available at* http://www.loc.gov/rr/frd/Military_Law/Enactments/law-index.pdf. Control Council Directive No. 51, which replaced Control Council Directive No. 10, states that "the only legislative acts which may contain penalty clauses are laws and orders." Control Council Directive 51, *Legislative and Other Acts of the Control Council* (Apr. 29, 1947), *reprinted in* 7 Enactments and Approved Paper of the Control Council and Coordinating Committee 27, *available at* http://www.loc.gov/rr/frd/Military_Law/Enactments/law-index.pdfindex.pdf.

occupied Germany were based on a foundation of customary international law. Section B demonstrates that those international law principles provided the framework for the prosecution of natural persons and organizations. Sections C and D review the legal framework used for the imposition of sanctions on corporations and the means by which that framework was applied to corporations.

Finally, Part II draws on our analysis to demonstrate the errors that underlie the *Kiobel* majority's troubling conclusion that the Nuremberg-era jurisprudence reflects the view that corporations could not be sanctioned for violations of international law.

A. The Allies Were Acting Pursuant to Customary International Law Norms

Scholars to this day differ on whether the customary international law principle of *debellatio* – the law governing complete conquest – was in effect in occupied Germany after unconditional surrender,[10] or whether the Allies were governing according to the customary international law of occupation, as codified in the 1907 Hague Regulations.[11] This debate is not

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[10] *See, e.g.*, Kevin Jon Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* 113-120 (2011); Eyal Benvenisti, *The International Law of Occupation* 91-96 (2004); Yoran Dinstein, *The International Law of Belligerent Occupation* 33 (2009).

[11] *See, e.g.*, Regulations Respecting the Laws and Customs of War on Land, annexed to Convention Respecting the Laws

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relevant to the issue *sub judici*, however, because the Allies, whether acting inside the various courtrooms in occupied Germany or outside the courtroom, aimed to make their actions conform to international law.

The earliest documents creating the Control Council demonstrate the Allies' commitment to international law norms. For example, the Potsdam Agreement made it clear that the "purposes of the occupation of Germany by which the Control Council shall be guided are the complete disarmament and demilitarization of Germany . . . to dissolve all Nazi institutions and to prepare for the eventual reconstruction of German political life . . . and for eventual peaceful cooperation in international life by Germany." Protocol of the Proceedings of the Berlin ("Potsdam") Conference, U.S.-U.K.-U.S.S.R., § II.A.3, Aug. 2, 1945, 3 Bevans 1207, 1220, *available at* http://avalon.law.yale.edu/20th_century/decade17.asp (*hereinafter* "Potsdam Agreement").

The actions of the Control Council both reflected pre-existing customary international law and contributed to the development in the future of such law. Customary international law is to be found in the "practice of states," Sir Robert Jennings & Sir Arthur Watts, 1 *Oppenheim's International Law* 25, 26 (9th

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and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, Art. 46, 2 AJIL Supp. 90 (1908) (Article 43 required that the laws of the occupied country be respected unless the occupier was "absolutely prevented" from doing so).

ed. 1996), which also encompasses activities such as their external conduct with each other, domestic legislation, diplomatic dispatches, internal government memoranda, and ministerial statements. *Id.* at 26. Indeed, judicial decisions are only a secondary source of customary international law, while the practice of states is primary evidence of that law. *See* Statute of the International Court of Justice art. 38(d), Jun. 26, 1945, 59 Stat. 1055, 1060, U.S.T.S. 993 (listing "judicial decisions" as a "subsidiary means for the determination of rules" of international law). Thus, to evaluate the customary international law applicable to corporations that emerged from the post-World War II period, it would be error to rely only on Nuremberg *judicial* actions, while ignoring the large body of state practice by the Allies that demonstrated that corporations were not considered immune under international law.[12]

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[12] Amici are aware of an amicus curiae brief filed by five academics before the Ninth Circuit in *Doe v. Nestlé*, C.A. No. 10-56739 (*Brief Amici Curiae Nuremberg Historians and International Lawyers in Support of Neither Party* (filed Nov. 4, 2011) ("*Nestlé* Amicus Brief")). The *Nestlé* Amicus Brief argues that the laws and directives issued by the Allied Control Council were not "regular law" (*id.* at 29), because these laws and directives "cited reasons of security and similar political reasons [for their issuance], and [so] none of them was remotely 'legal' in character." *Id.* Amici are puzzled by this distinction between (1) "regular law" that supposedly came out of the Nuremberg tribunals and (2) what must be some sort of "irregular law" issued by the Allied Control Council through its laws and directives (and clearly titled as "law"). First, no such distinction was made by the Allies, and nothing in the principles of international law at

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Further, the actions taken by the Control Council reflect *opinio juris*. As explained above, Article 38 of the Statute of the International Court of Justice identifies "state practice" as a preeminent source of international law. *Opinio juris* is an important means to be used to determine whether particular conduct by states over time in fact amounts to the "state practice" referenced in Article 38. Not only did the Allies' actions reflect settled practice, but they were carried out because "[t]he States concerned . . . [felt] that they [were] conforming to what amounts to a legal obligation." *The North Sea Continental Shelf Judgment*, 1969 I.C.J. 3, ¶ 77 (Feb. 20). The Allies, as occupiers of Germany between 1945 and 1949, believed that they were acting pursuant to international law and believed they were bound by it in their actions. This is reflected both in the actions taken by the Allies and in the language used in the laws they enacted.

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the Nuremberg trials – or predating Nuremberg or thereafter – limits international law to pronouncements made by judges. Second, the main source relied on by the Amicus Brief, Control Council Law No. 10, the constituent document for the later Nuremberg Trials, derives from the same process: if it was "regular law," then the other Control Council laws were as well.

Amici address this and other points here in anticipation of the possibility that a similar amicus brief may be filed before this Court.

B. The Legal Framework Created by the Allies Provided for Trials Against Natural Persons and Organizations

Prior to the London Charter, there was no international tribunal authorized to prosecute individual persons for international crimes.[13] The London Charter created the International Military Tribunal ("IMT") to try persons and set out the specific international crimes for which these so-called "major war criminals" would be prosecuted: crimes against peace, war crimes, crimes against humanity, and conspiracy.

No pre-war international treaty defined these crimes (save for war crimes) or made natural persons responsible for committing them. As a result, the Allies turned to customary international law. They did so in order to avoid the problem of *nulla crimen sine lege* (no crime without a law), thereby answering the accusation that the defendants in the dock at Nuremberg were being tried *ex post facto*. As Justice Robert Jackson, the chief Nuremberg prosecutor wrote in his Final Report to President Truman:

> We negotiated and concluded an Agreement with the four dominant powers of the earth, signed at London on August 8, 1945, which

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[13] Even though the Allied Powers contemplated putting Kaiser Wilhelm II on trial and included such a provision in the Versailles Treaty, such a trial never took place and an international tribunal was never constituted, although much-criticized trials were held pursuant to German law. Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* 59-60 (2000).

> for the first time made explicit and unambiguous what was theretofore, as the Tribunal has declared, implicit in International Law, namely, that to prepare, incite, or wage a war of aggression, or to conspire with others to do so, is a crime against international society, and that to persecute, oppress, or do violence to individuals or minorities on political, racial, or religious grounds in connection with such a war, or to exterminate, enslave, or deport civilian populations, is an international crime, and that for the commission of such crimes individuals are responsible.[14]

The Allied Control Council, charged with implementing the agreement made in the London Charter, furthered the work of the IMT by enacting Control Council Law No. 10 on December 20, 1945, exactly one month after the trial of the major war criminals had begun.[15] Under Control Council Law No. 10, each

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[14] Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials, London 1945, at 342 (U.S. Dep't of State, Pub. No. 3080, 1949), *available at* http://www.roberthjackson.org/files/thecenter/files/bibliography/1940s/final-report-to-the-president.pdf. *See also Nuremburg Judgment*, 6 F.R.D. 69, 108-10 (1947) (longstanding recognition that international law imposes duties and liabilities upon persons as well as upon states).

[15] Control Council Law No. 10, *Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity* (Dec. 20, 1945), *reprinted in* 1 Enactments and Approved Paper of the Control Council and Coordinating Committee 306, *available at* http://www.loc.gov/rr/frd/Military_Law/Enactments/law-index.pdf.

of the Allies could conduct their own international law trials in zones they occupied by following the explicit international law now set out in the London Charter.

The entire point of the IMT and the subsequent Nuremberg Military Tribunals ("NMT") held by the Americans pursuant to Control Council Law No. 10 was to put persons on trial for crimes committed on behalf of a sovereign state, the German Reich. The references to "individuals" or "persons" in Nuremberg documents were intended to make clear that persons – regardless of their official positions – could be held responsible for state crimes under international law. As Justice Jackson noted in his Opening Address to the IMT:

> The common sense of mankind demands that law shall not stop with the punishment of petty crimes by little people. It must also reach men who possess themselves of great power and make deliberate and concerted use of it to set in motion evils which leave no home in the world untouched. . . .[16]

This emphasis on personal as opposed to state liability also contrasted with the view, ultimately reached by the Allied Powers after the First World War, only to hold states responsible under international law.

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[16] Trial of the Major War Criminals Before the International Military Tribunal 98-155 (1947) ("the Blue Set"), *available at* http://avalon.law.yale.edu/subject_menus/imt.asp).

In addition, the London Charter, when it authorized the IMT to designate any group or organization as criminal, specifically enunciated that groups or organizations could violate international law: "At the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization." London Charter, Article 9.

The IMT prosecutors, in addition to the 22 people in the dock, also indicted six Nazi organizations: the Reich Cabinet, the *Sturmabteilungen* ("SA"), the German High Command, the Leadership Corps of the Nazi Party, the *Schutzstaffeln* ("SS") with the *Sicherheitsdienst* ("SD") as its integral part, and – separately – the *Geheime Staatspolizei* ("Gestapo"). The Nuremberg judges acquitted the first three organizations and designated the last three as criminal.[17]

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[17] The *Nestlé* Amicus Brief (at 16) argues that the conviction of the organizations was irrelevant because they had already been disbanded, so that declaring guilt was only a means to facilitate the prosecution of members. However, as explained here, both the disbanding and the convictions of the organizations were acts by a multinational body, under international law, targeting the organizations themselves, and thus the recognition that the organizations themselves could be culpable. As one scholar has noted, "[C]orporate and associational criminal liability was seriously explored, and was never rejected as legally unsound. These theories of liability were not adopted, but not because of any legal determination that it was impermissible under international law. Instead, their rejection was the result

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In addition to the condemnation by the international tribunals, Nazi organizations were subjected to other action by the Control Council. In fact, by the time these organizations were declared to be criminal by the IMT, they had been punished under international law because the Allies had already imposed upon them through international law the most severe punishment of all: juridical death through dissolution as well as the confiscation of all their assets.

What is critical is that the Allies carried out this punishment under international law. It was an international treaty that dissolved the Nazi Party and its related entities on September 20, 1945 (following the London Charter on August 8, 1945 and before the IMT trial began on November 20, 1945). Agreement Between Governments of the United Kingdom, United States of America, and Union of Soviet Socialist Republics, and the Provisional Government of the French Republic on Certain Additional Requirements to Be Imposed on Germany Art. 38 (Sept. 20, 1945), *reprinted in* Supplement: Official Documents, 40 Am. J.

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of the wishes of the occupation governments for handling the corporations and the coincidence that the first defendants tried were companies with the structures of Flick, Krupp, and Farben. Corporate or entity liability would have been novel, but no more so than other features of postwar accountability, starting with the idea of an international criminal trial, liability for a head of state, or for crimes against peace, crimes against humanity, or genocide." Jonathan A. Bush, *The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said*, 109 Colum. L. Rev. 1094, 1239 (2009).

Int'l L. 1, 29 (1946) ("The National Socialist German Workers' Party (NSDAP) is completely and finally abolished and declared to be illegal."). This death by dissolution was confirmed by Control Council Law No. 2, which abolished the Nazi Party and affiliated organizations permanently, declared them illegal, and authorized the confiscation of all their property and assets. Control Council Law No. 2, *Providing for the Termination and Liquidation of the Nazi Organizations* (Oct. 10, 1945), *reprinted in* 1 Enactments and Approved Paper of the Control Council and Coordinating Committee 131, *available at* http://www.loc.gov/rr/frd/Military_Law/Enactments/law-index.pdf.

Nuremberg-era jurisprudence, both inside and outside the courtroom, establishes, therefore, that not only states and natural persons can be liable for international law violations, but also juridical entities.

C. The Legal Framework Created by the Allies Provided for Actions Under International Law Against Corporations

The earliest pronouncement of the Allies at Potsdam and Yalta created a multinational framework for action against corporations complicit in the Nazi-era war crimes. The Yalta and Potsdam Agreements envisioned dismantling Germany's industrial assets, public and private, and creating a system of reparations for states and persons injured during the Nazi period. The Allied plan for post-war Germany was known as the "de" program, usually identified as

demilitarization, decartelization, denazification and democratization. Donald Bloxham, *Genocide on Trial: War Crimes Trials and the Formation of Holocaust History and Memory* 25 (2001). The program originated in the Potsdam Agreement, which stated: "At the earliest practicable date, the German economy shall be decentralized for the purpose of eliminating the present excessive concentration of economic power as exemplified in particular by cartels, syndicates, trusts and other monopolistic arrangements." Potsdam Agreement § II.B.12.

As a central component of this program, corporations faced demilitarization, deconcentration, and decartelization, as the Allies sought the elimination or control of all German industry that could be used for military production. There were two related objectives: the elimination of German's war potential[18] and the payment of reparations.[19]

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[18] "In order to eliminate Germany's war potential, the production of arms, ammunition and implements of war as well as all types of aircraft and sea-going ships shall be prohibited and prevented. Production of metals, chemicals, machinery and other items that are directly necessary to a war economy shall be rigidly controlled and restricted to Germany's approved post-war peacetime needs to meet the objectives stated in Paragraph 15. Productive capacity not needed for permitted production shall be removed in accordance with the reparations plan recommended by the Allied Commission on Reparations and approved by the Governments concerned or if not removed shall be destroyed." Potsdam Agreement § II.B.11.

[19] Potsdam Agreement §§ II.B.19, III.

The Control Council was charged with the "inflexible purpose" to "destroy German militarism and Nazism and to ensure that Germany will never again be able to disturb the peace of the world." Crimea Conference Communiqué (Feb. 2-11, 1945), *reprinted in* 1 Enactments and Approved Paper of the Control Council and Coordinating Committee 2, *available at* http://www.loc.gov/rr/frd/Military_Law/Enactments/Volume-I.pdf. To meet that goal, the Control Council was instructed to "[e]liminate or control all German industry that could be used for military production; bring all war criminals to justice and swift punishment and exact reparation in kind for the destruction wrought by Germans." *Id.* Its authority to confiscate property and provide for reparations, necessarily emanated from international law and not from local German law.

From the first of its laws, the Control Council made clear that corporations were subject to customary international law as implemented by the Control Council. Control Council Law No. 5 stated the plan to seize all German assets abroad "with the intention thereby of promoting international peace and collective security." The law specifically targeted corporations as well as natural persons, by defining "person" to include "collective" or "juridical" persons or entities.[20]

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[20] "[T]he term person shall include any natural person or collective person or any juridical person or entity under public or

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D. Control Council and Other Allied Laws, Orders and Directives Addressed Corporations

Before issuing Control Council Law No. 10 on December 20, 1945, which set up the Nuremberg international tribunals, the occupation authority issued Control Council Law No. 9 on November 30, 1945. Control Council Law No. 9, *Providing for the Seizure of Property Owned By I.G. Farbenindustrie and the Control Thereof* (Nov. 30, 1945), *reprinted in* 1 Enactments and Approved Papers of the Control Council and Coordinating Committee 225, *available at* http://www.loc.gov/rr/frd/Military_Law/Enactments/law-index.pdf. This law specifically directed the dissolution of I.G. Farben and the dispersal of its assets.

Control Council Law No. 9 was based on the customary international law prohibition of crimes against peace that the Allies cited in the London Charter and used to prosecute Nazi leaders for waging aggressive war.[21] The preamble to Control Council Law No. 9,

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private law having legal capacity to acquire, use, control or dispose of property or interests therein." Control Council Law No. 5, *Vesting and Marshalling of German External Sources* (Oct. 30, 1945), *reprinted in* 1 Enactments and Approved Papers of the Control Council and Coordinating Committee 225, *available at* http://www.loc.gov/rr/frd/Military_Law/Enactments/law-index.pdf.

[21] The Kellogg-Briand Pact made the planning and waging of aggressive war both illegal and criminal. Sheldon Glueck, *The Nuernberg Trial and Aggressive War*, 59 Harv. L Rev. 396, 407-12 (1946); Oscar Schacter, *In Defense of International Rules on Use of Force*, 53 U. Chi. L. Rev. 113, 115 n.132 (1986).

titled "*Providing for the Seizure of Property Owned By I.G. Farbenindustrie and the Control Thereof*," stated its clear purpose before ordering the dissolution of what was regarded as the Allies' principal economic enemy: the I.G. Farben industrial concern.

> In order to insure that Germany will never again threaten her neighbors or the peace of the world, and taking into consideration that I.G. Farbenindustrie knowingly and prominently engaged in building up and maintaining the German war potential. . . .[22]

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[22] Control Council Law No. 9, *Providing for the Seizure of Property Owned By I.G. Farbenindustrie and the Control Thereof* Preamble, (Nov. 30, 1945), *reprinted in* 1 Enactments and Approved Papers of the Control Council and Coordinating Committee 225, *available at* http://www.loc.gov/rr/frd/Military_Law/Enactments/law-index.pdf. *See also* Memorandum from B. Bernstein to Office of Military Government, United States (Germany), *reprinted in Elimination of German Resources for War: Hearings before a Subcommittee of the Senate Committee on Military Affairs Pursuant to S. Res. 107 and S. Res. 146*, 79th Cong., 1st Sess. (1945) (describing "program adopted by the Allied Powers at Potsdam to strip Germany of all of her external assets in the interest of future world security and to use such assets for the relief and rehabilitation of countries devastated by Germany in her attempt at world conquest. . . . [T]he primary purpose of the Allied Powers in acquiring all German holdings in other countries is to prevent their use by Germany in waging a third world war. . . ."). Disregarding that the dissolution was based both on an exhaustive examination of the facts and, as demonstrated above, on international law, the *Nestlé* Amicus Brief (at 30) asserts that the dissolution of I.G. Farben "was not based on legal criteria."

The punishment imposed by the Allied Control Council upon I.G. Farben was seizure. Article I of Control Council Law No. 9 states: "All plants, properties and assets of any nature situated in Germany which were, on or after 8 May, 1945, owned or controlled by I.G. Farbenindustrie A.G., are hereby seized and the legal title thereto is vested in the Control Council."[23]

This ultimate sanction was as drastic as any that could be imposed on a juridical entity: death through seizure, and was as much a pronouncement of international law as Control Council Law No. 10, which was used to prosecute natural persons and organizations. The extreme sanction of dissolution imposed by Control Council No. 9 is clearly inconsistent with a conclusion that international law at the time of Nuremberg did not consider corporations liable for violations of international law norms.[24]

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[23] *Id.* art. I.

[24] According to the *Nestlé* Amicus Brief, "[a] thorough review of the laws and decrees of [the Control Council] shows almost nothing remotely like a norm of civil or criminal culpability for corporations or other business entities," (*id.* at 28), because of the disparate treatment of various German corporations – dissolving some while "[m]any large and most small firms seemed to have faced no special legal consequences and were largely untouched." (*Id.* at 27). But this is exactly what the Allied prosecutors and the Nuremberg judges did: they prosecuted some persons while ignoring others and convicted some while acquitting others. Under this analysis, neither the Nuremberg tribunals nor, indeed, any system of criminal justice, could be considered to reflect anything "remotely like a norm of civil or criminal liability." In addition, the fact that some of the

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A subsequent directive provided further details about how the decartelization of Farben would take place. Allied High Commission Law No. 35, *Dispersal of Assets of I.G. Farbenindustrie* (Aug. 17, 1950), *reprinted in* Documents on Germany under Occupation, 1945-1954 at 503 (1955). Article 2 of Law No. 35 specified that "[u]ntil the Council of the Allied High Commission has otherwise decided, the British, French and United States I.G. Farben Control Officers shall continue to exercise all rights and powers of seizure and control over the assets subject to this Law *conferred by any Occupation Legislation*." *Id.* (Emphasis added).

Farben was not the only corporation subject to the ultimate sanction of dissolution. For example, the Control Council dissolved and liquidated a number of insurance companies under Control Council Law No. 57. Control Council Law No. 57, *Dissolution and Liquidation of Insurance Companies Connected with the German Labor Front* (Aug. 30, 1947), *reprinted in* 8 Enactments and Approved Paper of the Control Council and Coordinating Committee 1, *available at* http://www.loc.gov/rr/frd/Military_Law/Enactments/law-index.pdf. This law was enacted pursuant to Control Council Law No. 2, which targeted Nazi organizations. Other longstanding insurance companies such as Allianz were dismantled under Military Government

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liquidated corporations later reconstituted themselves does not eliminate the significance of the international action taken to dismantle them in the first place.

Law 52. Military Government Law No. 52, Military Government-Germany, United States Zone, *Blocking and Control of Property* (May 8, 1945), amended version *reprinted in* U.S. Military Government Gazette, Germany, Issue A, at 24 (June 1, 1946). *See* Gerald D. Feldman, *Allianz and the German Insurance Business, 1933-1945* 497-498 (2001).[25]

The Control Council also issued orders to carry out its mandate to seize the assets of other German corporations, both to dissolve and liquidate them and make the assets available for reparations.[26] Control Council Directive No. 39 noted that "the Potsdam decisions call for the liquidation of German war and industrial potential." *Id.* at preamble. The Principles to be followed in the "Rules for Liquidation" of war plants noted that buildings were to be "destroyed,

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[25] The *Nestlé* Amicus Brief (at 18) attempts to limit the significance of Control Council Law No. 57 by stating: "But the Council explained that these companies were all Nazi-front, -controlled, or -affiliated entities, and that they were being treated in effect as extensions of the regime." The *Nestlé* Brief does not mention any of the actions taken under Military Government Law No. 52.

[26] *See* Control Council Directive No. 39, *Liquidation of German War and Industrial Potential* (Oct. 2, 1946), *reprinted in* 5 Enactments and Approved Paper of the Control Council and Coordinating Committee 1, *available at* http://www.loc.gov/rr/frd/Military_Law/Enactments/law-index.pdf, and Control Council Directive No. 47, *Liquidation of German War Research Establishments* (Mar. 27, 1947), *reprinted in* 6 Enactments and Approved Paper of the Control Council and Coordinating Committee 95, *available at* http://www.loc.gov/rr/frd/Military_Law/Enactments/law-index.pdf.

declared available for reparations, or left for the peace-time economy in cases where they can be used for the peace-time economy. . . ." *Id.* at 3.

Corporations deemed to represent a threat of future international law violations were also subjected to sanctions short of dissolution. For example, identical versions of Law No. 75 were issued by both the Office of the Military Government of the United States and the British zonal authorities. These laws set the framework for the re-distribution of shares of German heavy industrial companies to their owners (after breaking the companies into smaller entities subject to Military Government Laws Nos. 52 and 56). However, the preamble of these parallel documents declared that the Military Government "will not allow the restoration of a pattern of ownership in these industries which would constitute excessive concentration of economic power and will not permit the return to positions of ownership and control of those persons who have been found or may be found to have furthered the aggressive designs of the National Socialist Party." *United Kingdom and United States Military Government Law No. 75: Reorganization of German Coal and Iron and Steel Industries* (Nov. 10, 1948, *reprinted in* Royal Institute of International Affairs (Margaret Carlyle, ed.), *Documents on International Affairs* 637-45 (1952). The language of these documents demonstrates the punitive intention of the Allied deconcentration policy.

In 1950, Allied High Commission Law No. 27 replaced Military Government Law No. 75 in the three

Western Zones and provided for the reorganization of German coal, iron, and steel industries, with the goal of "preventing the development of a war potential. . . ." Allied High Commission Law No. 27, *On the Reorganisation of the German Coal and Steel Industries* (May 16, 1950), Official Gazette of the Allied High Commission for Germany No. 20 299 (May 20, 1950); *see also* Allied Military Government, British Zone, *General Order No. 7 (Pursuant to Military Government Law No. 52): Iron and Steel Undertakings*, Military Government Gazette (Aug. 20, 1946). Article 2 of Law No. 27 provided: "The enterprises listed or described in Schedule A shall be liquidated and reorganized with a view to the elimination of excessive concentrations of economic power which constitute a threat to international peace. . . ." *Id.* Examples of deconcentration pursuant to Law No. 27 were the actions taken against German heavy industry. Large iron and steel conglomerates such as Krupp, Flick, and Vereinigte Stahlwerke AG were forcibly reorganized and broken down into 24 considerably smaller companies. *See* Law No. 27, Schedule A; Isabel Warner, *Steel and Sovereignty: The Deconcentration of the West German Steel Industry, 1949-54* 6-7 (1996).

In the U.S. Zone, elimination of concentrated economic power was explicitly linked to prevention of future violations of international law. Military Government Law No. 56 stated that it was enacted pursuant to the Potsdam Agreement in order to prevent Germany from endangering the safety of her neighbors or again constituting a threat to international

peace. Military Government Law No. 56, *Prohibition of Excessive Concentration of German Economic Power*, Military Government Gazette, U.S. Zone Issue C (Feb. 12, 1947). Identical language was repeated in British Military Government Ordinance No. 78, 16 Military Government Gazette 412 (Feb. 12, 1947). A Liquidation Commission set up by the quadripartite Control Council required that the Dresdner Bank close roughly half of its branches, including all branches east of the Oder-Neisse line. Commerzbank, Dresdner Bank from 1872 to 2009, https://www.commerzbank.com/media/konzern/neue_commerzbank/marke/geschichte/dresdner_bank_history.pdf. *See also War Crimes of the Deutsche Bank and the Dresdner Bank: Office of Military Government (U.S.) Reports* (Christopher Simpson, ed.) 255 (2002). The bank was also broken into ten smaller units.[27]

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[27] In the attempt to show that the Control Council Laws and Directives did not actually reflect "legal norms," the *Nestlé* Amicus Brief argues that laws and directives addressing businesses were "consistent with other CC laws addressing other dangerous entities." *Nestlé* Amicus Brief at 29, citing Control Council Law No. 2 (Termination and Liquidation of Nazi Organizations), Control Council Law No. 34, Dissolution of the Wehrmacht, *available at* http://www.loc.gov/rr/frd/Military_Law/Enactments/Volume-IV.pdf; Control Council Law No. 46, Abolition of the State of Prussia, *available at* http://www.loc.gov/rr/frd/Military_Law/Enactments/Volume-VI.pdf; and Control Council Directive No. 18: Disbandment and Dissolution of the German Armed Forces, *available at* http://www.loc.gov/rr/frd/Military_Law/Enactments/Volume-I.pdf. But this point supports the view that the Control Council was acting consistently in its implementation of the law.

In yet another example, Alfried Krupp, the sole owner of Krupp, was sentenced to 12 years imprisonment and ordered to forfeit all his property under Control Council Law No. 10, *United States v. Krupp (The Krupp Case)*, 9 Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10 1449, 1449-50 (1950), and the entire Krupp concern was confiscated pursuant to Military Government Law No. 52, and General Order No. 3. Allied Military Government, U.S. Zone, *General Order No. 3 (Pursuant to Military Government Law No. 52): Firma Friedrich Krupp* [General Order No. 3], Military Government Gazette (June 6, 1946).

A series of laws also focused on the denazification of industries and specifically regulated who businesses could hire. For example, Allied Military Government Law No. 8, stated, at Paragraph 1: "It shall be unlawful for any business enterprise to employ any member of the Nazi party or its affiliate organizations in any supervisory or managerial capacity, or otherwise than in ordinary labor." Allied Military Government, U.S. Zone, *Law No. 8: Prohibition of Employment of Members of Nazi Party in Positions in Business Other than Ordinary Labor and for Other Purposes*, Military Government Gazette (Sept. 26, 1945). *Id.* at ¶ 2.

The penalties imposed on these corporations, the distinction in the treatment of natural persons under Control Council Law No. 10 and the treatment of corporations under Control Council Law No. 9 and

the other laws and directives indicate that the principle of non-state liability for violations of international law was not limited to natural persons but applied as well to "juridical" persons such as corporations.

Of course, many of the actions taken to punish the corporations by the Allied Control Council and the Allied High Commission during the occupation were later undercut (or reversed) by the Western Powers as part of their campaign to make West Germany economically strong as a bulwark against further encroachment of Communism. However, the political decisions made during the early years of the Cold War to avoid wiping out particular corporations or to allow those corporations to regroup in other forms does not negate the import of the many actions indicating a recognition that corporations had violated international law and, under that law, could be held liable in multiple ways. As part of that same Cold War agenda, the Western Powers also commuted the sentences of the industrialists convicted at Nuremberg. However, such commutation does not take away from the principle that those industrialists convicted at Nuremberg committed crimes under international law.[28]

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[28] The *Nestlé* Amicus Brief states: "This is not to say that business entities and activities were not covered by various laws in other ways, for they were, as part of larger problems of the manufacture and retention or future capacity to make or hold war materiel and related resources. To that extent, business was thoroughly addressed by the Control Council, but for political

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II. THE MAJORITY IN *KIOBEL* MISINTERPRETED THE CONTEXT AND LEGACY OF THE NUREMBERG TRIALS

The *Kiobel* majority took a different view of Nuremberg-era international law. Relying solely on the absence of criminal prosecutions of corporations before the IMT or NMT, the majority concluded that under Nuremberg-era precedent, corporations could

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and security reasons only, and the authority was not law, but the Potsdam agreement or principles of peace and security." *Id.* p. 28. However, the decision by the Control Council to try persons through its Law No. 10 was also made for "political and security reasons," and its authority was the same legal authority – the Control Council – that issued directives and laws targeting German corporations. It is also strange that the *Nestlé* Amicus Brief does not consider the Potsdam Agreement law, since it is a multinational treaty signed by the United States, the Union of Soviet Socialist Republics and the United Kingdom and is a leading example of international law. And last, the *Nestlé* Amicus Brief states that for laws and directives issued by the "occupation officials" towards German firms to be recognized as "a norm of liability," these must show "(i) consistent adverse treatment of German business, (ii) administered with an intent to punish, and (iii) based on wrongdoing that violated specific legal standards." *Id.* at 24. Curiously, the brief cites no authority for this three-part requirement. Of course, none exists. Rather, the Control Council, as the legislative body of the international community in occupied Germany, through its laws and directives regularly applied norms of liability under international law by taking actions against persons (*i.e.*, Control Council Law No. 10) and corporations (*i.e.*, Control Council Law No. 9 and the other laws and directives cited above), and, through these actions, contributed to the development of new norms of international law.

not be liable for international law violations. In fact, the court of appeals fundamentally misapprehended the lessons of that era. The first error was the failure to recognize how those historic proceedings fit into the context of the entire program, described above, that the Allies created for defeated Germany at the end of the Second World War.

By failing to consider the IMT and post-IMT trials in the context of pre-Nuremberg customary international law, the majority in *Kiobel* made its second error. As noted above, the entire point of the IMT and NMT was to put persons on trial for crimes committed on behalf of a sovereign state, the German Reich. The references to "individuals" or "persons" in Nuremberg documents were intended to make clear that persons – regardless of their official positions – could be held responsible for state crimes under international law. The *Kiobel* majority's assertion that *only* natural persons were prosecuted and faced punishment by the IMT is incorrect. On the terminology itself, the *Kiobel* majority also erred, thus compounding its error that Nuremberg only intended to find human beings responsible for violations of international law. Control Council Law No. 10, upon which the majority relies heavily, uses the word "persons." As discussed above, under Control Council Law No. 5, the term "person" includes juridical persons. The majority also ignored the specific language authorizing the Tribunal to declare groups and organizations as criminal in Article 9 of the London Charter as well

as the indictment and conviction of Nazi organizations.

Nuremberg-era jurisprudence establishes, therefore, that not only states and natural persons can be liable for international law violations, but also juridical entities. The *Kiobel* majority opinion's statement that "[i]t is notable, then, that the London Charter . . . granted the Tribunal jurisdiction over *natural persons only*," *Kiobel*, 621 F.3d at 133, is simply incorrect. That the majority judges would make such a statement is puzzling, to say the least.

The *Kiobel* majority appeared to recognize the problem with this assertion, because in the next paragraph the opinion states that organizations were indeed indicted before the IMT and declared to be criminal organizations. *Id.* at 134. To deal with this problem in its argument, the majority then states: "Such a declaration [by the IMT judges of the criminality of an indicted organization], however, did not result in the organization being punished or having liability assessed against it. Rather, the effect of declaring an organization criminal was merely to facilitate the prosecution of *individuals* who were members of the organization." *Id.*

It appears that the judges, in making this statement, were unaware that, by the time of the tribunal, the Control Council had already destroyed the Nazi organizations under Control Council Law No. 2. To state, therefore, that the IMT judgment declaring the

organization criminal "did not result in the organization being punished or having liability assessed against it," *Kiobel*, 621 F.3d at 134, makes little sense, since these very same organizations were *already* punished and had liability assessed against them through earlier international accords promulgated by the Allies and their occupation authorities.

The conclusion of the *Kiobel* majority that the Nuremberg-era jurisprudence stands for the proposition that corporations could not be sanctioned for violations of customary international law is contrary to the historical record. From the imposition of the ultimate sanction of dissolution to the seizure of assets for reparations, it was understood that corporations could be "made to pay" for their complicity. To use Nuremberg-era jurisprudence as a basis to immunize corporations from liability under international law, we contend, would be contrary to the underlying goals of this jurisprudence. Justice Jackson and those working with him aimed to expand liability under international law and not to truncate it. Subjecting corporations to tort liability for violations of customary international law is consistent with that understanding.

CONCLUSION

For the foregoing reasons, Amici respectfully submit that Nuremberg-era international jurisprudence recognized the liability of corporations and

other organizations for violations of international law. Because the Nuremberg precedent is so important to international law, Amici Nuremberg Scholars request that the Court recognize this principle.

December 21, 2011

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APPENDIX

LIST OF AMICI CURIAE[1]

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Professor Bartov is the Chair of the Department of History, John P. Birkelund Distinguished Professor of European History, and Professor of History and Professor of German Studies at Brown University and is the author of seven books and the editor of three volumes on the Holocaust; his work has been translated into several languages. Born in Israel and educated at Tel Aviv University and St. Antony's College, Oxford, Omer Bartov began his scholarly work with research on the Nazi indoctrination of the German Wehrmacht under the Third Reich and the crimes it committed during the war in the Soviet Union. This was the main concern of his books, *The Eastern Front, 1941-1945* (St. Antony's College Series, 2001) and *Hitler's Army: Soldiers, Nazis and War in the Third Reich* (Oxford University Press, 1991). He has also studied the links between World War I and the genocidal policies of World War II, as well as the complex relationship between violence, representation, and identity in the twentieth century. His books *Murder in Our Midst: The Holocaust, Industrial Killing, and Representation* (Oxford University Press, 1996); *Mirrors of Destruction: War, Genocide and Modern Identity* (Oxford University Press, 2000); and *Germany's War and the Holocaust* (Cornell University

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[1] Affiliations are provided for identification purposes only.

Press, 2003) have all been preoccupied with various aspects of these questions.

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History in the Trials of the Holocaust (Yale University Press, 2001), a widely acclaimed study of war crimes trials; *Sense and Nonsensibility* (Simon and Schuster, 2004), a parodic look at contemporary culture co-authored with Amherst colleague Alexander George; and *The Catastrophist* (Other Press, 2006; Harcourt, 2007), a novel. In addition, he has co-edited ten books on current legal topics. His writings have appeared in numerous journals and magazines including *The Yale Law Journal*, *Representations*, *The New Yorker*, *The New York Times Book Review*, *The Washington Post*, and *The Times Literary Supplement*. He is currently at work on a book about the cultural afterlife of war crimes trials to be published by Princeton University Press.

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Sam Garkawe

Sam Garkawe is an Associate Professor at the School of Law and Justice at Southern Cross University in New South Wales, Australia. He has two Masters of Laws degrees from London University and Sydney University, and is admitted to the State Bar of California. Sam has published widely in the field of victimology, including issues concerning the role of victims in international justice mechanisms, such as the International Criminal Court and the South African Truth and Reconciliation Commission, and more recently on the need for a binding International Convention in support of victims. His published work includes a chapter entitled "The role and rights of victims at the Nuremberg International Military Tribunal" in the book *The Nuremburg Trials: international criminal law since 1945: 60th anniversary international conference*. He presently teaches victimology, human rights, criminal law and procedure,

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Dr. Kevin Jon Heller is currently a Senior Lecturer at Melbourne Law School, where he teaches international criminal law, comparative criminal law, and criminal law. He holds a Ph.D. in law from Leiden University and a J.D. with distinction from Stanford Law School. His academic writing has appeared in a variety of leading academic journals, including the *European Journal of International Law*, the *American Journal of International Law*, the *Journal of International Criminal Justice*, the *Harvard International Law Journal*, the *Michigan Law Review*, the *Leiden Journal of International Law*, and the *Journal of Criminal Law & Criminology*. In February 2011, Stanford University Press published his edited book *The Handbook of Comparative Criminal Law*, and in June 2011 Oxford University Press published his book *The Nuremberg Military Tribunals and the Origins of International Criminal Law*, the first

book-length study of the twelve trials held in the American occupation zone between 1946 and 1949. He has also been involved in the International Criminal Court's negotiations over the crime of aggression, served as Human Rights Watch's external legal advisor on the trial of Saddam Hussein, and was one of Radovan Karadzic's formally-appointed legal associates from December 2008 until February 2011.

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Professor Kelly is Professor of Law and Associate Dean for International Programs and Faculty Research at Creighton University School of Law. He has served as chair of the Association of American Law Schools (AALS) Section on National Security Law and is president of the U.S. National Chapter of L'Association International du Droit Pénal, a Paris-based society of international criminal law scholars, judges, and attorneys founded in 1924 that enjoys consultative status with the United Nations. His research and teaching focuses on the fields of international and comparative law and Native American law. He is the author and co-author of four books and over thirty articles and book chapters in these areas. He has taught International Criminal Law for over a decade.

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AMICUS CURIAE BRIEF

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SUPREME COURT, U.S.
FILED
DEC 21 2011
OFFICE OF THE CLERK

Nos. 10-1491; 11-88

IN THE SUPREME COURT OF THE UNITED STATES

ESTHER KIOBEL, et al.,
Petitioners.

v.

ROYAL DUTCH PETROLEUM CO., et al.,
Respondents.

ASID MOHAMAD, et al.,
Petitioners.

v.

PALESTINIAN AUTHORITY, et al.,
Respondents.

On Writs of Certiorari to the
United States Courts of Appeals for
the Second Circuit and District of Columbia Circuit

BRIEF OF FORMER U.S. SENATOR ARLEN SPECTER, HUMAN RIGHTS FIRST, AND THE ANTI-DEFAMATION LEAGUE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

This Brief of *Amici Curiae* is respectfully submitted pursuant to Supreme Court Rule 37 in support of the Petitioners.[1] All parties have consented to the filing of this brief. *Amici* have a long-standing commitment to promoting respect for human rights and accountability for human rights abuses.

Former U.S. Senator Arlen Specter served five terms as a United States Senator from Pennsylvania, from 1980 through 2011. Senator Specter is a former Chairman and Ranking Member of the Senate Committee on the Judiciary. He has long supported the rights of torture victims to seek redress in U.S. courts. Senator Specter was the principal advocate in Congress for the adoption of the Torture Victim Protection Act ("TVPA"), having first introduced the legislation in 1986.

Human Rights First ("HRF") is a non-profit, nonpartisan international human rights organization based in New York and Washington, D.C. HRF builds respect for human rights and the rule of law to help ensure the dignity to which everyone is entitled and to stem intolerance, tyranny, and violence. HRF, then known as the Lawyers Committee for Human Rights, played an

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[1] Pursuant to Supreme Court Rule 37(6), *Amici* affirm that no counsel for a party authored this brief in whole or in part and no person other than *Amici* or their counsel made a monetary contribution to this brief. Consent letters have been filed with the Court by the parties.

important role in promoting the adoption of the TVPA.

The Anti-Defamation League ("ADL") was founded in 1913 to combat racial, ethnic, and religious discrimination. Today, the League is one of the world's leading civil and human rights organizations, fighting hate, bigotry, and anti-Semitism. ADL's nearly 100-year history is marked by a commitment to protecting civil and human rights, both in the United States and abroad. In this connection, ADL has often filed *amicus curiae* briefs in cases arising under the TVPA.

Amici believe their professional expertise and knowledge of the TVPA will assist this Court in its deliberations.

SUMMARY OF ARGUMENT

In 1991, Congress adopted the Torture Victim Protection Act to address a significant gap in U.S. law. While foreign nationals had a right to pursue civil remedies in U.S. courts for serious human rights abuses such as torture or extrajudicial killing, U.S. citizens had no comparable right under the Alien Tort Statute ("ATS"). The TVPA addressed this omission in federal law by establishing a right of action for torture and extrajudicial killing, thereby affording U.S. citizens the same rights already granted to foreign nationals. The TVPA was also adopted to ensure victims of torture and extrajudicial killing would have a right of action for such acts even if the

courts developed a restrictive approach to ATS litigation.

The TVPA establishes civil liability to any "individual" who commits acts of torture or extrajudicial killing. The text and legislative history of the TVPA do not limit its applicability to natural persons. In U.S. law, the word "individual" can include juridical persons such as organizations and corporations. The TVPA's legislative history also reveals Congress's goal in using the word "individual" was to make clear foreign governments would not be subject to the TVPA. History shows that human rights abuses can emanate from any entity, and liability must be extended accordingly. For these reasons, Congress would not have limited the TVPA's scope of liability to natural persons.

For 20 years, the TVPA and the ATS have served essential functions by punishing perpetrators of serious human rights abuses, providing redress for victims, and deterring future harms. The TVPA's plain meaning and legislative history make clear it was designed to work in tandem with, and not in opposition to, the ATS. Indeed, the ATS still serves a vital role, allowing foreign nationals to bring claims for torture and extrajudicial killing as well as other serious violations of international law such as slavery, genocide, crimes against humanity, and war crimes. This Court acknowledged the distinct and complementary roles of the TVPA and ATS in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 728, 731 (2004). This relationship should not be changed in the absence of explicit congressional action.

The decisions in *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010) and

Mohamad v. Rajoub, 634 F.3d 604 (D.C. Cir. 2011) would eviscerate a legal framework that has been affirmed by the three branches of government on numerous occasions. Allowing these decisions to stand would cause further injury to victims of serious human rights abuses and would send the wrong message to perpetrators of such egregious acts.

ARGUMENT

I. THE TEXT AND LEGISLATIVE HISTORY OF THE TVPA OFFER NO INDICATION IT WAS MEANT TO AFFECT OR PREEMPT THE ATS

The TVPA was established to provide a right of action to U.S. citizens for torture and extrajudicial killing, thereby affording U.S. citizens the same right already granted to foreign nationals through the ATS. Nothing in the TVPA's text or legislative history indicates it was meant to affect or preempt the ATS. This Court should rely on the plain meaning of the TVPA and its accompanying legislative history to reject efforts to alter it beyond its congressionally authorized parameters. *Cf. Samantar v. Yousuf*, 130 S. Ct. 2278 (2010) (relying on the text, purpose, and history of the Foreign Sovereign Immunities Act to reject efforts to alter its application).

A. The Text of the TVPA Offers No Indication It Was Meant To Affect or Preempt the ATS

In 1991, Congress adopted the Torture Victim Protection Act to supplement the remedies already available under the Alien Tort Statute.[2] Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992).

The TVPA establishes a cause of action for torture and extrajudicial killing. The statute provides, in pertinent part:

> An individual who, under actual or apparent authority, or color of law, of any foreign nation, (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

28 U.S.C. § 1350 (note), at § 2(a).

In contrast, the Alien Tort Statute was established in 1789 as part of the First Judiciary

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[2] The TVPA was first introduced in 1986 by Senator Arlen Specter to establish "a federal right of action against violators of human rights" and authorize "suits by both aliens and U.S. citizens who have been victims of gross human rights abuses." 132 CONG. REC. S7062 (June 6, 1986) (internal citations omitted).

Act. It now provides "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. According to this Court's seminal decision in *Sosa v. Alvarez-Machain*, 542 U.S. at 712, the ATS is a jurisdictional grant, which also enables "federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law."

There is no textual basis for suggesting the TVPA was meant to affect or preempt the ATS as the TVPA contains no reference to the ATS. These statutes do not conflict, but rather coexist, each with a distinct purpose. Therefore, courts must give effect to both statutes. *See J.E.M. AG Supply v. Pioneer Hi-Bred Int'l*, 534 U.S. 124 (2001). A court determining the rights of a U.S. citizen who is the victim of torture does not address the ATS in such a suit. Similarly, an ATS suit based upon acts of torture, extrajudicial killing, or other universally recognized norms such as slavery or genocide does not implicate the TVPA. In such circumstances, "[c]ourts, are not at liberty to pick and choose among congressional enactments[.]" *Morton v. Mancari*, 417 U.S. 535, 551 (1974). Because the ATS and TVPA are "capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."[3] *Id.* Courts should not override

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[3] *See also Cty. of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985) (where a later congressional enactment does not cover every issue of a federal

such clear legislative choices. *Whitfield v. United States*, 543 U.S. 209, 216-217 (2005). Unless congressional intent to displace the earlier statute is "clear and manifest . . . the later act is to be construed as a continuation of, and not a substitute for, the first act." *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936). In the absence of clear congressional intent, courts should give full effect to both statutes.

B. The Legislative History of the TVPA Offers No Indication It Was Meant to Affect or Preempt the ATS

Unlike the ATS, the TVPA has an extensive legislative history. This history offers clear evidence that the TVPA was not meant to affect or preempt the ATS. Rather, the TVPA was meant to address a significant gap in U.S. law. While foreign nationals had a right to pursue civil remedies in U.S. courts for serious human rights abuses such as torture or extrajudicial killing, U.S. citizens had no comparable right.

According to the 1991 House Committee Report on the TVPA, torture violates standards of conduct accepted by virtually every nation, and its prohibition has attained the status of customary international law.[4] "These universal principles

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common law claim, courts are not free to supplement legislative enactments rendering them meaningless).

[4] House and Senate committee reports may be regarded as an explanation of legislative intent

provide scant comfort, however, to the thousands of victims of torture and summary executions around the world. Despite universal condemnation of these abuses, many of the world's governments still engage in or tolerate torture of their citizens, and state authorities have killed hundreds of thousands of people in recent years." H.R. REP. NO. 102-367, at 3 (1991). *See also* S. REP. NO. 102-249, at 2 (1991).

The House Committee Report acknowledged the role of the ATS in providing redress to victims of human rights abuses. It cited *Filartiga v. Pena-Irala*, 630 F.3d 876 (2d Cir. 1980), which first recognized the modern application of the ATS, with approval. But, it also recognized the limits of the ATS, which only extended a civil remedy to foreign nationals and not to U.S. citizens. The TVPA was meant to address this limitation.[5]

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where the meaning of a statute is obscure, *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 474 (1921), or where the legislative history indicates that the meaning proposed by a party is inapposite, *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 266 (1979).

[5] *See also Torture Victim Protection Act Hearing of 1989: Hearing on S.1629 and H.R. 1662 Before the Subcomm. on Immigration & Refugee Affairs of the S. Comm. on the Judiciary*, 101st Cong. 51 (1990) ("The Lawyers Committee believes that the Torture Victim Protection Act affords Congress the opportunity to both reaffirm the principles underlying the *Filartiga* decision and its progeny, and to provide a clear statement of legislative and

> The TVPA would . . . enhance the remedy already available under section 1350 in an important respect: While the Alien Tort Claims Act provides a remedy to aliens only, the TVPA would extend a civil remedy also to U.S. citizens who may have been tortured abroad. Official torture and summary executions merit special attention in a statute expressly addressed to those practices. At the same time, claims based on torture or summary executions do not exhaust the list of actions that may appropriately be covered by section 1350. That statute should remain intact to permit suits based on other norms that already exist or may ripen in the future into rules of customary international law.

H.R. REP. NO. 102-367, at 4.

The House Committee Report makes clear the TVPA was not adopted to replace the ATS; rather,

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political support for victims of human rights abuse who are able to bring a case against their oppressors. The Torture Victim Protection Act will not replace the 200-year old Alien Tort Claims Act. Instead, it will make relief clearly available to United States citizens as well as aliens who are the victims of torture or extrajudicial killing abroad.").

it was designed to work in conjunction with that statute.[6]

> The TVPA would establish an unambiguous and modern basis for a cause of action that has been successfully maintained under an existing law, section 1350 of the Judiciary Act of 1789 (the Alien Tort Claims Act) . . . . Section 1350 has other important uses and should not be replaced. There should also, however, be a clear and specific remedy, not limited to aliens, for torture and extrajudicial killing.

Id. at 3.

The Senate Committee Report accompanying the TVPA offered the same analysis in nearly the

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[6] *See also Torture Victim Protection Act: Hearings and Markup Before the Committee on Foreign Affairs and Its Subcommittee on Human Rights and International Organizations*, 100th Cong., 1 (1988) (statement of Rep. Yatron, Member, House Subcomm. on Human Rights and International Organizations) ("International human rights violators visiting or residing in the United States have formerly been held liable for money damages under the Alien Tort Claims Act. It is not the intent of the Congress to weaken this law, but to strengthen and clarify it. Federal courts should not allow congressional actions with respect to this legislation to prejudice positive developments, but rather to act upon existing law when ruling on the cases presently before them.").

same language. *See* S. REP. NO. 102-249, at 3 (1991).

> The TVPA would establish an unambiguous basis for a cause of action that has been successfully maintained under an existing law, section 1350 of title 28 of the U.S. Code, . . . Section 1350 has other important uses and should not be replaced.

The legislative record also reveals that Congress adopted the TVPA as a bulwark against possible judicial curtailment of the ATS. At the time of the TVPA's adoption, only two circuit courts had addressed the ATS. As noted *supra*, Congress cited the *Filartiga* decision and its approach to ATS litigation with approval throughout its deliberations on the TVPA. At the same time, Congress expressed concerns about the D.C. Circuit's opinion in *Tel-Oren v. Libyan Arab Republic*, 725 F.2d 774 (D.C. Cir. 1984), in which Judge Bork criticized the *Filartiga* approach to the ATS. H.R. REP. NO. 102-367, at 3-4; S. REP. NO. 102-249, at 4-5. This uncertainty surrounding the ATS coincided with the adoption of the Convention against Torture and subsequent ratification debates in the Senate.[7] As a result, the TVPA was

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[7] The Convention against Torture was referenced throughout the TVPA's legislative history. *See, e.g.*, S. REP. NO. 102-249, at 3 (1991) ("This legislation will carry out the intent of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,

meant to ensure victims of torture and extrajudicial killing would have a right of action even if the courts developed a restrictive approach to ATS litigation. This reasoning appears throughout the legislative record.[8]

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which . . . obligates state parties to adopt measures to ensure that torturers within their territories are held legally accountable for their acts."); H.R. REP. NO. 102-367, at 1, 3. Significantly, the Convention against Torture also requires States Parties to provide remedies to victims of torture and does not limit this obligation to victims tortured by natural persons. Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, art. 14, Dec. 10, 1984, 1465 U.N.T.S. 85

[8] In submitting the bill to the Senate, Senator Specter acknowledged the goal of the TVPA was to remove any uncertainty with respect to civil claims for torture and extrajudicial killing.

> The landmark case of *Filartiga v. Pena-Irala* confirmed that official torture is in fact a violation of the law of nations. . . . Since that holding, several recent decisions have questioned whether this statute provides a clear basis for future suits in U.S. federal courts. In *Tel-Oren v. Libyan Arab Republic*, for example, judges dismissed an action brought under Section 1350 and noted the lack of clear congressional guidance on the subject. . . . The legislation I am

On signing the TVPA into law, President George H.W. Bush acknowledged the importance of providing a civil remedy to victims of torture.

> Today I am signing into law H.R. 2092, the "Torture Victim Protection Act of 1991," because of my strong and continuing commitment to advancing respect for and protection of human rights throughout the world. The United States must continue its vigorous efforts to bring the practice of torture and other gross abuses of human rights to an end wherever they occur.[9]

Statement on Signing the Torture Victim Protection Act of 1991, Mar. 12, 1992, 28 WEEKLY COMP. PRES. DOC. 465 (Mar. 16, 1992).

In sum, the text and legislative history of the TVPA offer no indication it was meant to affect or preempt the ATS.[10] Indeed, this Court

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> introducing today . . . seeks to clarify this area of law.

132 CONG. REC. S7062 (June 6, 1986) (internal citations omitted).

[9] Statement on Signing the Torture Victim Protection Act of 1991, Mar. 12, 1992, 28 WEEKLY COMP. PRES. DOC. 465 (Mar. 16, 1992).

[10] The U.S. Government has offered a similar interpretation of the TVPA in various pronouncements to the international community. *See, e.g.*, Committee against Torture, Consideration of Reports Submitted by States

acknowledged the distinct and complementary roles of the TVPA and ATS in *Sosa v. Alvarez-Machain*, 542 U.S. at 728, 731. Despite numerous requests to do so, this Court declined to limit the ATS through a strained reading of the TVPA. "Congress has not in any relevant way amended § 1350 or limited civil common law power by another statute." *Id.* at 725. Rather, this Court acknowledged congressional réaffirmation of the ATS through the TVPA. Congress "not only expressed no disagreement with our view of the proper exercise of the judicial power, but has responded to its most notable instance by enacting legislation supplementing the judicial determination in some detail." *Id.* at 731. In so doing, this Court reaffirmed numerous decisions upholding accountability for human rights abusers under the ATS.[11] *Id.* at 732 (citing

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Parties Under Article 19 of the Convention: United States of America, U.N. Doc. CAT/C/28/Add.5 (2000), at 61 ("While the Alien Tort Claims Act only provides a remedy to foreign nationals, the 1992 Torture Victim Protection Act allows both foreign nationals and United States citizens to claim damages against any individual who engages in torture or extrajudicial killing . . . ."). *See also* Committee against Torture. Consideration of Reports Submitted by States Parties Under Article 19 of the Convention: United States of America, U.N. Doc. CAT/C/48/Add.3 (2005), at 25-26.

[11] The majority of circuit courts support the position that the ATS does not limit the TVPA. *See, e.g., Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 415 F.3d 1242, 1250-1251 (11th Cir. 2005)

In re Estate of Marcos Human Rights Litigation, 25 F.3d 1467 (9th Cir. 1994); *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980)).

II. THE TEXT AND LEGISLATIVE HISTORY OF THE TVPA DO NOT LIMIT ITS APPLICATION TO NATURAL PERSONS

The TVPA was adopted to expand rather than contract the rights of victims of torture and extrajudicial killing. It promotes accountability for such acts and serves as a deterrent against future harms. It would be inconsistent with these purposes to interpret the TVPA in a restrictive manner.

While the TVPA establishes civil liability to any "individual" who commits an act of torture or

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(finding no apparent intent by Congress to alter the scope of the ATS and concluding that "a plaintiff may bring distinct claims for torture under each statute."); *Kadic v. Karadzic*, 70 F.3d 232, 241 (2d Cir. 1995) ("The scope of the Alien Tort Act remains undiminished by enactment of the Torture Victim Act."). *See also Enahoro v. Abubakar*, 408 F.3d 877 (7th Cir. 2005) (Cudahy, J., dissenting) ("In view of the text of the TVPA itself, the circumstances surrounding its passage, the canons of statutory interpretation discouraging repeals by implication, the legislative history of the Act and prevailing judicial rulings on the subject, it is clear that the TVPA was not intended to preempt or restrict aliens' ability to bring claims for torture and extrajudicial killing under the ATCA.").

extrajudicial killing, the text and legislative history of the TVPA do not limit is applicability to natural persons.[12] This Court has recognized that "individual" can be synonymous with "person." *Clinton v. City of New York*, 524 U.S. 417, 428 (1998). Equally significant, the word "person" is not limited in its meaning to only natural persons; its meaning can include other actors such as corporations. *Santa Clara Cty. v. S. Pac. R.R. Co.*, 118 U.S. 394, 396 (1886).

Moreover, the TVPA's legislative history explains why Congress used the word "individual" in the TVPA. It was done to ensure foreign governments would not be subject to the TVPA and could only be sued through the Foreign Sovereign Immunities Act ("FSIA"). According to the Senate Committee Report:

> The legislation uses the term 'individual' to make crystal clear that foreign states or their entities cannot be sued under this bill under any circumstances: only individuals may be sued. Consequently, the TVPA is not meant to override the Foreign

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[12] This interpretation is supported by The Dictionary Act. "In determining the meaning of any Act of Congress," the word "person" includes corporations and other juridical entities "unless the context indicates otherwise . . . ." 1 U.S.C. § 1. The purpose of the TVPA was to provide a remedy for victims of torture and extrajudicial killing. It would be inconsistent with the TVPA to limit the scope of liability to a whole class of defendants.

> Sovereign Immunities Act (FSIA) of 1976, which renders foreign sovereigns immune from suits in U.S. courts, except in certain instances.

S. REP. NO. 102-249, at 7 (footnote omitted). The House Committee Report offered a similar explanation. "Only 'individuals,' not foreign states, can be sued under the bill." H. REP. 102-367, at 4. As this Court recognized in *Samantar v. Yousuf*, 130 S. Ct. at 2285-2286, the FSIA establishes a specialized civil liability regime that applies to foreign states. Since its adoption, Congress has been careful not to create any exceptions to foreign state civil liability outside the FSIA. The TVPA's use of the word "individual" ensured the FSIA would continue to provide the exclusive mechanism for suing foreign states.

Since its adoption in 1991, several courts have addressed and affirmed the TVPA's applicability to juridical persons. *See, e.g., Sinaltrainal v. Coca-Cola Co.* 578 F.3d 1252, 1264 (11th Cir. 2009); *Aldana v. Del Monte Fresh Produce*, 416 F.3d 1242, 1250 (11th Cir. 2005). Despite these cases, Congress has not revised the TVPA or offered any indication it disagreed with findings of liability for juridical persons, including organizations.

While the ATS represents a distinct legal regime for accountability and redress, these arguments apply with equal force to ATS proceedings against corporations. Efforts to exclude corporations from ATS liability are contrary to the text and legislative history of the statute. Indeed, as this Court noted in *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S.

428, 438 (1989), the ATS "by its terms does not distinguish among classes of defendants."

History shows that human rights abuses can emanate from any entity, including organizations.[13] It logically follows that liability must apply accordingly. To hold otherwise would embolden perpetrators of human rights abuses to organize and combine their resources, thereby increasing their lethality and, oddly, their immunity from liability. Surely Congress did not intend such an outcome when it adopted the TVPA.

III. THE TVPA AND THE ATS SERVE ESSENTIAL FUNCTIONS IN PUNISHING SERIOUS HUMAN RIGHTS ABUSERS, PROVIDING REDRESS FOR VICTIMS, AND DETERRING FUTURE HARMS

The TVPA and the ATS serve essential functions by punishing serious human rights abusers, providing redress for victims, and deterring future harms. Their work is complementary, but distinct, and this relationship should not be changed in the absence of explicit congressional action.

The Alien Tort Statute has played a critical role in punishing perpetrators of serious human rights abuses and has done so for over thirty years. It

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[13] *See, e.g.*, Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, art. 9, Aug. 8, 1945, 82 U.N.T.S. 279 (authorizing the Nuremberg Tribunal to declare any group or organization to be criminal).

establishes civil liability for perpetrators of serious human rights abuses – from torture and extrajudicial killing to genocide and war crimes. And, it provides victims with the ability to seek redress for their injuries in U.S. courts. In *Kadic v. Karadzic*, 70 F.3d at 232, for example, victims of genocide, war crimes, and torture were able to bring a successful action against Radovan Karadzic, the purported leader of the Bosnian Serb faction responsible for the brutal campaign of ethnic cleansing in Bosnia-Herzegovina. In *Cabello v. Fernandez-Larios*, 402 F.3d 1148 (11th Cir. 2005), the family of a murdered Chilean government official brought a successful civil action for crimes against humanity, torture, and extrajudicial killing against the perpetrator. *See also In re Estate of Marcos Human Rights Litigation*, 25 F.3d at 1467 (successful ATS action against perpetrator of summary execution, forced disappearance, and torture); *Filartiga v. Pena-Irala*, 630 F.2d at 876 (successful ATS action against perpetrator of torture).

The Torture Victim Protection Act has played an equally significant role for over twenty years, providing U.S. citizens the opportunity to pursue justice in U.S. courts for torture and extrajudicial killing and holding perpetrators accountable. In *Samantar v. Yousuf*, 130 S. Ct. at 2278, for example, the lead plaintiff is a U.S. citizen whose only hope for redress after having been subjected to torture is through the TVPA. In *Reyes v. Lopez Grijalba*, No. 02-22046-CIV, slip op. at 16-21 (S.D. Fl. 2006), two U.S. citizens brought a successful civil action through the TVPA for torture and

extrajudicial killing. These lawsuits would not have been possible without the TVPA. *See also Chavez v. Carranza*, 407 F. Supp. 2d 925, 930 (W.D. Tenn. 2004) (U.S. citizens successfully recover in TVPA claims for torture and extrajudicial killing); *Xuncax v. Gramajo*, 886 F. Supp. 162, 178 (D. Mass. 1995) (U.S. citizen successfully recovers in TVPA claim for torture). Narrowing the TVPA to prevent U.S. citizens from reaching a whole class of defendants would be contrary to these developments.

Despite 20 years of coexistence between the ATS and TVPA, Congress has not felt the need to revise either statute. *Sosa v. Alvarez-Machain*, 542 U.S. at 725. Congress has not revised either statute since the *Sosa* decision.[14] And, it has declined to do

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[14] Four months after the *Sosa* decision, Senator Dianne Feinstein introduced a legislative proposal to restructure the ATS. Senate Bill 1874 would have placed significant restrictions on ATS litigation. 151 CONG. REC. S11423, 11433 (Oct. 18, 2005). Specifically, the bill would have limited ATS cases to six enumerated claims (torture, extrajudicial killing, genocide, piracy, slavery, or slave trading) but only if the defendant was a direct participant acting with specific intent to commit the alleged tort. S. 1874, 109th CONG. § 2(a) (2005). District courts would not have jurisdiction "if a foreign state is responsible for committing the tort in question within its sovereign territory." *Id.* Other provisions would have placed further restrictions on ATS litigation. For example, district courts would have been precluded from proceeding

so despite extensive litigation involving both statutes.

Congress has established a civil liability regime that is designed to offer redress to victims, punish perpetrators, and deter future abuses. The decisions in *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d at 111 and *Mohamad v. Rajoub*, 634 F.3d at 604, would eviscerate a legal framework that has been affirmed by the three branches of government on numerous occasions. Allowing these decisions to stand would cause further injury to victims of serious human rights abuses and would send the

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with ATS cases "if the President, or a designee of the President, adequately certifies to the court in writing that such exercise of jurisdiction will have a negative impact on the foreign policy interests of the United States." *Id.* at § 2(e). Anonymous complaints would have been precluded except in narrow circumstances. Contingency fee arrangements would have been precluded. *Id.* at § 2(f) and (g). Not surprisingly, the announcement of the bill was met with strong criticism. Eight days after it was submitted, Senator Feinstein withdrew the bill from consideration. In a letter to Senate Judiciary Chairman Arlen Specter, Senator Feinstein indicated "that the legislation in its present form calls for refinement in light of concerns raised by human rights advocates, and thus a hearing or other action by the Committee on this bill would be premature." Letter from Senator Dianne Feinstein, to Senator Arlen Specter (Oct. 25, 2005).

wrong message to perpetrators of such egregious acts.

CONCLUSION

Amici respectfully submit that the ATS and TVPA serve important, but distinct, functions in our legal system. The TVPA was adopted to establish a right of action for torture and extrajudicial killing. thereby affording U.S. citizens the same rights already granted to foreign nationals under the ATS. It was not meant to affect or preempt the ATS. And. it would be inconsistent with the TVPA's very purpose to interpret it in a restrictive manner by limiting its application to natural persons.

For the foregoing reasons, this Court should reverse the lower court rulings and find in favor of Petitioners.

Respectfully submitted, December 21, 2011

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AMICUS CURIAE BRIEF

SUPREME COURT, U.S.
FILED
DEC 21 2011
OFFICE OF THE CLERK

Nos. 11-88 and 10-1491

In The Supreme Court of The United States

ASID MOHAMAD, *ET AL.*, *Petitioners,*

v.

PALESTINIAN AUTHORITY AND PALESTINE LIBERATION ORGANIZATION,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

ESTHER KIOBEL, *ET AL.*, *Petitioners,*

v.

ROYAL DUTCH PETROLEUM CO., *ET AL.*, *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF JOSEPH E. STIGLITZ AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF JOSEPH E. STIGLITZ AS *AMICUS CURIAE*

This brief *amicus curiae* is respectfully submitted by Joseph E. Stiglitz, professor of economics at Columbia University. [1] Professor Stiglitz has extensive expertise in economic theory and global economic development.

Amicus wishes to clarify central principles of business investment and economic development relevant to the question of corporate liability under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, and the Torture Victims Protection Act ("TVPA"), 28 U.S.C. § 1350 note, presented in the cases before the Court, and address arguments, presented by *amici* in similar ATS cases, that corporate liability will adversely affect investment both in the United States and abroad and undermine the competitiveness of U.S. corporations.[2]

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[1] Pursuant to Rule 37.3 of this Court, all parties have consented to the filing of this brief. Letters providing such consent have been filed with the Clerk of the Court. And pursuant to Rule 37.6, *Amicus Curiae* certifies that no counsel for any party authored this brief in whole or in part, and neither counsel for any party nor any party itself provided a monetary contribution to support preparation of this brief. Further, no person or entity provided monetary contributions in support of this brief. *Amicus Curiae* prepared this brief with the *pro bono* assistance of Dr. Michael Cragg, Dr. Lisa Cameron, and Mr. David Hutchings of the Brattle Group, Dr. Arjun Jayadev of the University of Massachusetts, Boston, and Ms. Elizabeth Johnston, Esq., of the George Washington University.

[2] *See, e.g., Flomo v. Firestone Nat'l Rubber Co., LLC*, 643 F.3d 1013, 1021 (7th Cir. 2011) (Posner J.) (dismissing

Amicus previously submitted his views on the economic impacts of other litigation involving the ATS to the U.S. Court of Appeals for the Second Circuit.[3] *Amicus* reiterates his views here that there is no foundation for arguments asserting that potential liability under the ATS deters mutually advantageous and constructive foreign investment and trade.

Amicus previously taught at Princeton University, Stanford University, Yale University, and the Massachusetts Institute of Technology. In 2001, he was awarded the Nobel Prize in Economic Sciences for his analyses of markets with asymmetric information. He was a lead author of the

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amicus's "seemingly not tongue in cheek" argument "that corporations shouldn't be liable under the Alien Tort Statute because that would be bad for business"); Br. for Chamber of Commerce of the U.S.A. as *Amicus Curiae* in Supp. of Defs.-Appellees, *Flomo*, 643 F.3d 1013 (7th Cir. 2011) (No. 10-3675) ("*Flomo* Chamber Br."), 2011 WL 2452309, at *22–25; Br. for The Chamber of Commerce of the U.S.A. & Nat'l Foreign Trade Council as *Amicus Curiae* in Supp. of Defs.-Appellees at 7–25, *Doe v. Nestle, U.S.A., Inc., et al.*, No. 10-56739 (9th Cir. Oct. 7, 2011) ("*Nestle* Chamber Br."); Br. for U.S. Council for Int'l Business as *Amicus Curiae* in Supp. of Defs.-Appellees at 29–31, *Doe v. Nestle, U.S.A., Inc., et al.*, No. 10-56739 (9th Cir. Oct. 7, 2011) ("Council Br."). Additionally, Judge Jacobs, in his concurrence with the *Kiobel* panel's denial of rehearing, asserted that corporate liability would "beggar" corporations. *See Kiobel v. Royal Dutch Petroleum Co.*, 642 F.3d 268, 270 (2d Cir. 2011) (Jacobs, J., concurring).

[3] Br. for *Amicus Curiae* Joseph E. Stiglitz in Supp. of Pls.-Appellees, *Balintulo v. Daimler AG*, No. 09-2778-CV (2d Cir. Nov. 30, 2009), 2009 WL 7768608.

1995 Report of Intergovernmental Panel on Climate Changes, which shared the 2007 Nobel Peace Prize.

Amicus served as a member of the Council of Economic Advisers from 1993 to 1995, and as its chairman from 1995 to 1997. He was Chief Economist and Senior Vice President of the World Bank from 1997 to 2000. In 2009, he was appointed by the President of the United Nations General Assembly to chair the Commission of Experts on Reform of the International Financial and Monetary System.

Amicus founded the *Journal of Economic Perspectives* of the American Economic Association, co-founded the *Journal of Globalization and Development* and *Economists' Voice,* and has authored or co-authored leading economics texts including: *Economics of the Public Sector*; *Economics*; *Principles of Macroeconomics*; and *Principles of Microeconomics*. He has authored or co-authored the following popular and scholarly titles: *Globalization and Its Discontents*; *The Roaring Nineties*; *Towards a New Paradigm in Monetary Economics*; *Fair Trade for All*; *Making Globalization Work*; *The Three Trillion Dollar War: The True Cost of the Iraq Conflict*; *Stability with Growth*; *Peasants vs. City Dwellers: Taxation and the Burden of Economic Development*; and *Freefall: America, Free Markets, and the Sinking of the Global Economy*.

SUMMARY OF ARGUMENT

These cases present the question of whether a corporation can be liable under the ATS and the TVPA for a violation of customary international law.[4] In addition to questions involving statutory interpretation and international law that these cases present, some have raised a variety of policy questions concerning corporate liability under the ATS. Persistent among these is the question whether the ATS is, simply put, "bad for business." *See Flomo v. Firestone Nat'l Rubber Co., LLC*, 643 F.3d 1013, 1021 (7th Cir. 2011) (Posner, J.).[5]

Specifically, opponents of corporate liability have argued that ATS litigation against corporations will: (1) drive corporations away from less developed countries ("LDCs"), thus undermining their progress; (2) place U.S. businesses at a competitive disadvantage because, *inter alia*, some of their competitors are beyond the reach of the law; and (3) deter foreign investment in the United States as foreign corporations seek to avoid the jurisdiction of

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[4] Though, for simplicity's sake, *Amicus* directs his arguments in the remainder of this brief to the ATS, they apply with equal force to corporate liability under the TVPA and thus to the issues presented in *Mohamad v. Palestinian Authority and Palestine Liberation Organization*, No. 11-88, argued in tandem with this case. *Amicus* thus submits this brief in support of Petitioners in both *Kiobel* and *Mohamad*.

[5] *See also Kiobel*, 642 F.3d at 270 (Jacobs, J. concurring) (voicing concern that ATS would "beggar" foreign corporations).

U.S. courts.[6] These arguments are without merit, and the Court should reject them as a policy basis for restraining the reach of the ATS and the TVPA.

As an initial matter, corporate liability under the ATS provides an efficient mechanism for addressing human rights violations, particularly where local regulatory systems and judicial enforcement mechanisms are weak or non-existent. With recognition of corporate liability for ATS claims, those with the most information about the harm—the victims—have the greatest incentive to enforce compliance. And corporations that are in the best position to monitor compliance have a strong incentive to police their own conduct. Transaction costs associated with enforcing customary international law prohibiting the most egregious human rights violations are thus reduced.

In addition to efficiency advantages, corporate liability under the ATS would promote long-term economic development and foreign direct investment in LDCs. Concern that the expected cost of potential future ATS suits will cause corporations to withdraw from LDCs appears to be little more than hyperbole, lacking empirical support. The risk of liability—*any* liability—is just one among many considerations that drive investment decisions. And although corporations have faced the specter of ATS liability for more than a decade, there is little empirical evidence that it has had any impact on foreign direct

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[6] *Flomo* Chamber Br., 2011 WL 2452309, at *23–25; *Nestle* Chamber Br. at 7–25; Council Br. at 29–31.

investment. Instead, continued investment in LDCs by corporations that have incentives to meet international human rights standards can be expected to result in improved human rights conditions. Such conditions foster stability and long-term economic development and attract foreign direct investment.

Further, concerns that U.S. firms subject to ATS liability would be disadvantaged relative to their competitors not subject to jurisdiction here are overblown. First, without the ATS, U.S. corporations may face *greater* risk of tort liability than their foreign counterparts doing business here. This is because litigants may turn to state common law to enforce human rights standards and states may seek to police the conduct of their corporate citizens. Second, U.S. corporations whose conduct comports with customary international law may experience a competitive advantage because their competitors' costs of compliance will be higher than their own. Third, corporations subject to liability may experience greater access to foreign markets where LDC governments that lack strong enforcement mechanisms nevertheless seek investment by corporations more likely to adhere to international human rights standards. Fourth, even if recognition of corporate liability under the ATS were to cause U.S. corporations to disinvest in LDCs with poor human rights records, that short-term disinvestment should be more than offset by long-term improvements in LDCs' economic and social climate, which the ATS encourages and which ultimately benefit U.S. corporations.

Finally, the argument that the risk of being subject to the jurisdiction of our courts under the ATS would deter foreign investment in the United States is implausible. The risk of liability is tightly constrained by the limited range of claims actionable under that statute. Foreign investors balancing that risk against other investment-driving factors, such as the United States' sophisticated capital markets and educated labor force, will continue to find the United States an attractive market. And even were disinvestment to occur, the gap would be filled by increased investment by U.S. firms, with no significant negative effect on the economy.

ARGUMENT

I. TORT LIABILITY CREATES APPROPRIATE INCENTIVES THAT ENHANCE ECONOMIC EFFICIENCIES.

Tort law represents an important part of our economic system. It provides incentives for appropriate behavior by requiring those who injure others (*i.e.*, those who commit tortious violations of law), to pay damages to those whom they have harmed. Opening the door to corporate liability under the ATS would be bad for *bad* businesses. However, discouraging conduct that violates human rights—as in this case—and other customary international law embodies the very purpose of tort law. It requires firms to internalize the costs that their harmful acts impose on others.

Tort law functions as a complement to other mechanisms, including regulation and taxation, created to deal with negative externalities [7] and current and future infractions of law. Regulations can prevent only some violations from occurring and, in the absence of an omniscient and omnipotent regulator, persons and companies can cause harm to others. In such situations, tort law empowers those with the most information about the harm with the ability to seek redress. The knowledge that such redress is available provides incentives for market participants not to engage in injurious behavior. [8]

In the case of corporate liability under ATS, the fact that private parties can seek redress is particularly advantageous. This is because the harmful acts at issue are the most egregious torts in

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[7] A negative externality occurs when the actions of one party cause harm that is neither compensated by enforcing private rights nor adequately addressed by public law means.

[8] The notion that corporate liability will impose discipline on investors and lenders is parallel to the doctrine of odious debt. That doctrine has a long history, beginning with the arguments of Alexander Sack in the 1920s and continuing today. It suggests that sovereign debt incurred under illegitimate regimes should not be held to be repayable to creditors because they were debts not taken in the name of the public benefit. *See generally* Seema Jayachandran & Michael Kremer, *Odious Debt*, 96(1) Am. Econ. Rev. 82, 82–92 (2006). The existence of credible ex post sanctions against lenders provides lenders and investors with incentives to pursue their activities in ways that do not violate international law or embolden illegitimate regimes. Corporate liability under the ATS creates similar incentives.

violation of customary international law. These egregious violations may occur in locations in which domestic courts provide an inadequate forum for pursuing and/or enforcing tort claims, while other forms of sanctions, such as regulation and taxes, are weakly applied.

Moreover, it is now well-recognized that in a modern economy, the provision of appropriate incentives (to avoid injury to others) *must* extend beyond the imposition of liability to the person who commits the injury. In particular, corporations must be provided with incentives to discourage and deter their employees from engaging in such potentially harmful acts and to develop monitoring systems that ensure compliance with corporate policies. With corporations in the best position to monitor such activities, this approach can minimize transactions costs. In addition, the limited resources of persons—as compared to those of the corporations for which they work—would attenuate the effectiveness of a system that imposes liability on persons alone. Recognizing corporate liability under the ATS thus enhances the efficiency of economic activity.

Furthermore, recognition of corporate liability would demonstrate commitment to a variety of widely shared principles and morals. The liability imposed by the ATS reflects norms of human rights endorsed by international law. The United States values, and benefits from, the existence of such international norms. And the enforcement of these norms by the United States confirms and promotes their universality.

II. CORPORATE LIABILITY UNDER THE ATS PROMOTES LONG-TERM ECONOMIC DEVELOPMENT AND FOREIGN DIRECT INVESTMENT IN LDCs.

Opponents of corporate liability under the ATS contend that providing for corporate accountability for human rights violations will impede commerce and harm LDCs that rely on valuable foreign direct investment ("FDI") for their economic and social development. But, as detailed below, this assertion rests on at least three implicit assumptions contradicted by the available empirical evidence and sound economic principles. *Amicus* discusses each of these implicit assumptions below.

First, proponents of this argument assert that imposing liability on corporations for their involvement in the most egregious human rights violations will induce them to exit LDCs in which they had invested or to refrain from investing in LDCs where they may be implicated in human rights violations. This claim lacks any empirical support. In fact, although victims have used the ATS as a means to enforce violations of human rights for the last 30 years[9] and courts have assumed for the last decade that corporations may be subject to ATS liability,[10]

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[9] *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004) (recognizing *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), as the first of a modern series of cases applying the ATS).

[10] *See Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 57 (D.C. Cir. 2011) ("The issue of corporate liability has remained in the background during the thirty years since the Second

to date, no study has shown that this source of liability has reduced investment in LDCs. Indeed, dire predictions of the impact of the ATS have simply not materialized. *See* Robert Knowles, *A Realist Defense of the Alien Tort Statute*, 88 Wash. U. L. Rev. 1117, 1156–59 (2011) (discussing Gary Clyde Hufbauer & Nicholas K. Mitrokostas, *Awakening Monster: The Alien Tort Statute of 1789* (Inst. for Int'l Econ. 2003), and noting those authors' predictions that the ATS would depress worldwide trade by 10 percent, cause a 25 percent loss of FDI in target countries, and cost the United States hundreds of thousands of manufacturing jobs have not materialized).[11]

Circuit decided *Filartiga*, while numerous courts have considered cases against corporations or other juridical entities under the ATS without any indication that the issue was in controversy, whether in ruling that ATS cases could proceed or that they could not on other grounds.") (citation omitted).

[11] Some opponents of corporate liability under the ATS have suggested Talisman Energy divested its oil operations in Sudan because of ATS litigation against it for complicity in human rights violations by the Sudan government. *See, e.g.*, Br. for the Chamber of Commerce as *Amicus Curiae* in Supp. of Defs.-Appellants at 28, *Balintulo v. Daimler AG*, No. 09-2778-CV (2d Cir. Aug. 24, 2009) (arguing that the "ATS suit . . . caused the company to divest even though [the] court ultimately dismissed the suit." (citing Stephen J. Kobrin, *Oil and Politics: Talisman Energy and Sudan*, 36 N.Y.U. J. Int'l L. & Pol. 425, 426 (2004)). Talisman's decision, however, was influenced by a range of factors: a complex web of political risks that had adverse economic and public relations outcomes for Talisman. Among them were the Canadian government's investigation of Talisman's operations in the Sudan and the pressure it placed on the company, the United States' designation of

This is not surprising given the many considerations driving corporate investment decisions. These considerations include: the overall business climate; access to infrastructure, capital, labor, and natural resources; governmental attitudes towards business; and broader social and political stability. The risk of civil liability, of any type, is just one among many cost considerations that corporations evaluate in assessing the likely return on any investment. Ultimately, profitability drives the investment decision, and is thus necessarily fact-specific, defying any generalized prediction about the impact of exposure to ATS liability on FDI in LDCs generally.

In fact, most firms disavow engaging in such abhorrent behavior, especially publicly listed firms that are subject to close public scrutiny. They know the pressure that will be brought to bear should they engage in such behavior. For these responsible firms, the ATS is welcome: it does not circumscribe their behavior, but instead may help create a more level playing field on which they can compete against firms that do not face such scrutiny.

Second, this argument assumes that economic development is unrelated to respect for human

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Sudan as a state-sponsor of terrorism, and a campaign by nongovernmental organizations targeted at the U.S. and Canadian governments and Talisman's shareholders that ultimately caused several of Talisman's large institutional investors to sell their shares and significantly affected the company's share price and enterprise value. *See* Kobrin, *supra*, at 439–50, 455.

rights. But several economic studies show that respect for civil liberties and human rights are associated with improved economic performance. Perhaps the most compelling evidence on this point comes from work done at the World Bank while *Amicus* was Chief Economist there. That study, by Isham, Kaufmann, and Pritchett, examined the performance of World Bank-financed projects in countries with stronger and weaker civil liberties. *See* Jonathan Isham, *et al.*, *Civil Liberties, Democracy, and the Performance of Government Projects*, 11 The World Bank Econ. Rev. 219. (1997).[12] It found that economic returns to projects were systematically higher in countries that had higher scores on indices of human rights and civil liberties. Isham, *et al.*, *supra* at 229–30. Hence, the recognition of corporate liability under the ATS, which creates incentives for compliance with customary international law, promotes an environment that fosters economic development in LDCs.

Third, this claim assumes that high standards for human rights erode an LDC's competitiveness in attracting capital and economic activity. This assumption is contradicted, however, by the available empirical evidence on human rights and FDI, which suggests strongly that foreign capital flows to countries that have respect for human rights. Blanton and Blanton (2007) provide the most

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[12] The focus on World Bank projects removed any variation in effects that might arise from studying projects financed by different investors.

extensive examination of the impact of human rights legislation on FDI. They conclude that:

> Directly, respect for human rights reduces risk to FDI as it signals enhanced political stability and predictability within a host country and reduced corporate vulnerability to outcries by a socially conscious consumer public. Indirectly, human rights facilitate an environment conducive to the development of human capital, with foreign investors increasingly attracted to countries where they can draw upon high-skilled labor.

Shannon Lindsey Blanton & Robert G. Blanton, *What Attracts Foreign Investors? An Examination of Human Rights and Foreign Direct Investment*, 69 J. of Pol. 143, 153 (2007). Thus, recognizing corporate liability under the ATS will enhance adherence to international law regarding human rights by corporations operating in LDCs. Hence, it can be expected to increase, not decrease, capital flows to those countries.

It is also important to recognize that worldwide efforts to improve LDC labor standards have not produced any measurable declines in FDI in LDCs; indeed, evidence points in the opposite direction—improved labor rights may be associated with greater FDI. *See* David Kucera, *The Effects of Core Workers Rights on Labour Costs and Foreign Direct Investment: Evaluating the "Conventional Wisdom"* 2

(Int'l Institute for Labour Studies, Discussion Paper No. 130 (2001)); Emmanuel Teitelbaum, *Measuring Trade Union Rights Through Violations Recorded in Textual Sources: An Assessment*, 63 Pol. Res. Q. 461, 471–72 (2010). The movement to improve LDC labor standards is, in some ways, analogous to the application of ATS. It seems obvious that a firm is more likely to fall afoul of national laws regarding labor standards than it is to violate international law regarding human rights. Given that improved LDC labor standards have had no measurable impact on FDI, the claim that liability under the ATS will result in a significant decrease in FDI appears far-fetched.

III. CORPORATE LIABILITY FOR ATS CLAIMS WILL NOT FORECLOSE ECONOMIC OPPORTUNITIES FOR U.S. BUSINESSES ABROAD.

It is also said that the creation of a potential new source of legal liability for violations of customary international law could cause U.S. corporations to decrease their investment in areas where, for instance, egregious labor practices or other local or political conditions might increase the risk of liability under ATS. It is further claimed that U.S. corporations would be thereby disadvantaged relative to firms not subject to the jurisdiction of U.S. courts.

Of course, the fact that some countries, such as those with oppressive or abusive regimes, may tolerate egregious practices that might subject firms

to ATS liability does not mean that U.S. firms must engage in such practices or collaborate with the regime, such that they become vulnerable to ATS claims. Beyond this, however, the available evidence does not support the claim that recognition of corporate liability under the ATS would foreclose opportunities for U.S. companies operating abroad.

First, as discussed *supra*, there is no convincing evidence that the possibility of being sued under the ATS for human rights violations has ever deterred companies subject to jurisdiction of our federal courts from investing in countries where the investment would be profitable despite the potential exposure to liability. Moreover, it is important to recall that ATS liability would apply only to those firms that take advantage of such countries' failure to enforce or respect human rights norms.

Second, since a vast number of multinational corporations have at least some business presence in the United States that subjects them to jurisdiction (or at least creates the possibility of jurisdiction), corporate liability under the ATS will not place U.S. firms at a competitive disadvantage relative to those foreign firms. In fact, the ATS may level the playing field for firms *incorporated* in the United States. This is because U.S.-incorporated firms may face greater exposure for violations of state tort law associated with their conduct abroad than foreign

firms that are merely doing business in the United States.[13]

Third, U.S. firms can reap significant benefits from the imposition of ATS liability, particularly where LDC governments are concerned about violations of international law but lack the enforcement tools or local laws to protect against them. In particular, the recognition of corporate liability under the ATS can assure LDC governments that firms subject to the ATS have strong incentives to meet universally accepted minimal standards of conduct. This assurance can significantly increase such firms' access to LDC markets, where governments typically retain considerable oversight over entry by foreign firms.

Fourth, there is evidence to suggest that application of the ATS to U.S. companies that

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[13] This may be so, for example, where the corporation is a state citizen and the state's choice of law provisions dictate a strong state interest in regulating the conduct of state citizens, thus favoring application of state law though the conduct occurred abroad. *Cf. Doe v. Exxon*, 654 F.3d 11, 65–70 (D.C. Cir. 2011) (considering non-federal tort claims brought against, *inter alia*, U.S. corporations for conduct abroad, and applying state choice of law analysis to determine which law applied). While foreign law may be applied to non-federal tort claims, U.S. corporations face a greater risk that tort law of the state in which they reside may be applied compared to foreign corporations that just do business in that state, exposing U.S. corporations to a wider range of tort claims based on their conduct abroad. Therefore, contrary to the contention of some, without corporate liability under the ATS, U.S. firms may be more, not less, disadvantaged relative to foreign firms.

already maintain stringent human rights standards will provide these good corporate citizens with a competitive advantage. This is because laws that create corporate liability do not increase costs for all companies equally. A company that does not need to change its behavior to comply with international law will not incur extra costs of compliance. Recognition of corporation liability under the ATS will put such a company on a more favorable footing than corporations that have not implemented policies and procedures to protect against such violations. Thus, ATS liability might be bad for bad businesses, but it is good for good businesses.

The impact of the Sarbanes-Oxley Act of 2002, Pub. L. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 15 U.S.C.), which imposed potentially costly accounting standards on companies operating in the United States, is instructive. In the wake of that Act, some foreign companies chose to delist from U.S. exchanges. Yet several studies found that the firms that delisted in order to avoid compliance with the Act had weaker corporate governance than foreign firms that did not delist. Furthermore, these firms' delisting decisions had economic consequences: their stock price fell relative to those of foreign firms that continued to cross-list. *See, e.g.*, Peter Hostak, *et al.*, *An Examination of the Impact of the Sarbanes-Oxley Act on the Attractiveness of U.S. Capital Markets for Foreign Firms* 28–29 (Sept. 5, 2011) (unpublished manuscript) *available at* http://ssrn.com/abstract=956020. Thus, when the United States creates legal liability for good

corporate behavior, compliant multinational corporations can reap economic benefits. *See* John C. Coffee, Jr., *Law and the Market: The Impact of Enforcement*, 156 U. Pa. L. Rev. 229, 231 n.2 (2007) (noting that foreign firms' decision to list in U.S. in spite of additional regulations, disclosure requirements, and stringent enforcement may be the cause of empirically observed U.S. listing premium).

Finally, it is important to recognize that the overriding goal of imposing tort liability for egregious violations of customary international law is to discourage lawbreaking that results in losses in economic and social value. Thus , even if recognition of corporate liability for either direct or secondary violations, such as aiding and abetting egregious conduct by a state, resulted in short-term disinvestment from that state, the costs of such short-term disinvestment should ultimately be outweighed by long-term economic and social gains.

This long-term net gain is demonstrated by U.S. experience with the Foreign Corrupt Practices Act ("FCPA"), 15 U.S.C. §§ 78dd-1, *et seq.*, another U.S. law with extraterritorial application. At least one study has demonstrated that U.S. business in some bribery-prone countries fell sharply following the implementation of the FCPA.[14] *See, e.g.*, Paul J.

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[14] The FCPA may have had an impact on U.S. business in bribery prone countries, in part, because of the possibility for *criminal*, as well as civil, penalties, including imprisonment of officers, directors and employees. *See* 15 U.S.C. § 78dd-2(g). Imposition of only civil liability under the ATS would not be expected to have as significant effect.

Beck, *et al.*, *The Impact of the Foreign Corrupt Practices Act on US Exports*, 12 Managerial & Decision Econ. 295, 303 (1991). However, few would suggest that the U.S. should have abandoned its strong anti-bribery stance to avoid the decline in U.S. corporate investment in countries with a history of corruption. Rather, U.S. efforts were directed at ensuring that others adopted similar standards. During the Clinton Administration, *Amicus* was active in promoting such practices at the OECD; these have now indeed become standard. Good businesses now find that the climate for their investment is improved. Furthermore, American businesses, which by and large eschew such corrupt practices, have been the overall beneficiaries: in addition to the more conducive business environment they now encounter, US firms also earn a reputational premium because they are known to be good corporate actors.

Similarly, it may be the case that bad firms willing to perpetrate, participate in, or aid and abet egregious human rights violations may be discouraged from operating in states that tolerate or commit human rights abuses. That should not, however, be an argument against corporate liability under the ATS, but should instead be an argument

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Additionally, the FCPA was enacted at a time when bribery was the norm, or at least not uncommon, in many countries. By contrast, violations of customary international law at issue in modern ATS cases are comparatively rare, and, *Amicus* believes, especially rare among American companies.

for broadening the reach of laws designed to ameliorate these abuses.

IV. CORPORATE LIABILITY FOR ATS CLAIMS WILL NOT AFFECT INVESTMENT IN THE UNITED STATES.

It is also argued that corporate liability under the ATS will cause a decrease in investment in the U.S. as foreign companies seek to avoid personal jurisdiction in U.S. federal courts, and thus, the reach of the law. According to this spurious logic, courts should reject corporate liability under the ATS because corporations would not initiate new business opportunities in the United States if they were to be held accountable for injuring others through their operations abroad. This argument, however, has little economic support; most, if not all, properly valued investments (with positive risk-adjusted net present value) in the United States and abroad will proceed.

Moreover, the threat of foreign corporations withdrawing from, or declining to invest, in the United States would have a significant economic impact only if there were large numbers of foreign companies with access to technology, knowledge, or resources that were not available to U.S. firms. Because there are few—if any—niches in the U.S. market for which these conditions hold true, any decrease in investment by the foreign firm would be offset by increased investment by American firms. Hence, even if one were to assume, *arguendo*, that foreign firms might decrease their investment in the

United States, such disinvestment would not have a significant negative impact on the U.S. economy.

Similarly specious reasoning lies behind the claim that the specter of frivolous lawsuits favors rejecting corporate liability under the ATS. Like any other tool used to elicit appropriate behavior, tort law has costs and benefits. On the benefit side, it is often a more efficient means than regulation for creating accountability and inducing appropriate behavior. On the cost side, there is frivolous litigation. But the cost of using regulation to prevent human rights violations in countries with weak or poor records with respect to governance is likely to be much greater, if such regulation is even feasible.

Properly applied, tort law achieves the objective of promoting good behavior and accountability with benefits that exceed the costs. Moreover, the number of claims under the ATS is constrained by the law's limitation to only the most universally accepted (and thus most egregious) human rights violations[15] and

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[15] *See Sosa*, 542 U.S. at 732 (only claims for violation of norms that are "specific, universal, and obligatory" are actionable under the ATS) (quoting *In re Estate of Marcos Human Rights Litig.*, 25 F.3d 1467, 1475 (9th Cir. 1994)); *see also Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 159 (2d Cir. 2010) (Leval, J., concurring in the judgment) ("Suits alleging ordinary, less repugnant, less universally condemned torts . . . will be dismissed whether brought against a natural person or a corporation because of failure to plead a violation of the law of nations."), *cert. granted*, 132 S. Ct. __ (2011) (No. 10-1491). The Chamber of Commerce itself admits that in more than two decades of modern application of the ATS to human rights violations,

the likelihood that suits would be limited to those brought by residents of, and for conduct occurring in, countries with the weakest legal systems, where domestic redress is unavailable.

In any case, the assertion that recognition of corporate liability for ATS claims would cause foreign companies to flee the U.S. arises from a naive model that fails to account for the many considerations that drive a firm's decision about where and how to invest. As noted above, these considerations include overall business climate, access to infrastructure, access to capital, labor, and natural resources, governmental attitudes towards business, and broader social and political stability. The U.S. economy offers, among other economic advantages, access to sophisticated capital markets, an educated labor pool, and the purchasing power of United States consumers. Given the scope of the U.S. economy, large, multinational businesses effectively have no choice but to locate some operations or conduct some business in the U.S. Thus, the benefits of operating in the U.S. are likely

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just over 150 claims have been filed against corporations, or, on average, only about seven suits annually, *Flomo* Chamber Br., 2011 WL 2452309, at 22, amid the 200,000 to nearly 300,000 civil cases filed annually in our federal courts over that period, *see* United States Courts, Judicial Facts and Figures 2010, tbl. 4.1 (217,879 civil cases filed in 1990; 282,895 civil cases filed in 2010), http://www.uscourts.gov/uscourts/Statistics/JudicialFactsAndFigures/2010/Table401.pdf.

to outweigh any potentially increased costs of doing business here.

V. CORPORATE LIABILITY UNDER THE ATS IS AN ECONOMICALLY EFFICIENT MEANS OF DISCOURAGING VIOLATIONS OF UNIVERSALLY RECOGNIZED PRINCIPLES OF INTERNATIONAL LAW.

The analysis above indicates that recognizing corporate liability for ATS claims will not harm economic development of LDCs, U.S. businesses operating abroad, or investment in the U.S. The net economic value generated by firms that violate fundamental human rights is dubious at best, and the broader adverse effects of these firms' legal violations are unambiguous. From a global perspective, competition based on such violations distorts the global marketplace. U.S. firms, the U.S. economy, and U.S. values are enhanced by discouraging such distortions.

Given this, recognizing corporate liability under the ATS is an economically efficient means of allowing firms to compete fairly in a global economy while enhancing social welfare and conforming to standards of international law. The research on sanctions for behavior that violates international law has recognized the value of penalties that focus their impact on the perpetrators of harmful actions while minimizing any collateral damage to the general population. Promoting individual accountability for unlawful actions is both more fair and effective than blanket sanctions or embargoes. *See* Watson Inst. for

Int'l Studies, Brown U., *Strengthening Targeted Sanctions Through Fair and Clear Procedures* 5 (Mar. 30, 2006), *available at* http://www.watsoninstitute.org/pub/Strengthening_Targeted_Sanctions.pdf.

Currently, various sanctions that are targeted at persons and firms have become part of the general operations of the United Nations and other international regulatory agencies. Such penalties include financial sanctions, travel and aviation bans, embargoes on particular commodities, and so on. ATS liability for corporations is an extension of these efforts. However, unlike targeted sanctions, which require state approval, recognizing ATS liability for corporations allows private actors to draw attention to and penalize firms that violate international law. This is efficient because it draws upon private information and incentives, just as whistleblower laws do. In cases where local governments are unable or unwilling to reprimand multinational corporations, ATS liability allows for a credible and efficient deterrent to the most egregious human rights violations. ATS liability thus functions as an independent, judicially enforced deterrent to violations of, and safeguard for, basic human rights, while enhancing social welfare and economic value in the long term.

CONCLUSION

For the foregoing reasons, this Court should reject policy arguments asserting adverse economic consequences from corporate liability under the ATS

and the TVPA, and reverse the judgments of the Courts of Appeals for the Second Circuit and the District of Columbia.

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December 21, 2011

AMICUS CURIAE BRIEF

FILED
DEC 16 2011
OFFICE OF THE CLERK

Nos. 10-1491 and 11-88

In The Supreme Court of the United States

ESTHER KIOBEL, et al.,

Petitioners,

v.

ROYAL DUTCH PETROLEUM CO., et al.,

Respondents.

ASID MOHAMAD, et al.,

Petitioners,

v.

PALESTINIAN AUTHORITY, et al.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Second And District Of Columbia Circuits

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INTEREST OF THE *AMICUS CURIAE*

The Yale Law School Center for Global Legal Challenges is an independent Center that promotes the understanding of international law, national security law, and foreign affairs law.[1] The Center aims to close the divide between the legal academy and legal practice by connecting the legal academy to U.S. government actors responsible for addressing international legal challenges. In the process, the Center aims to promote greater understanding of legal issues of global importance – encouraging the legal academy to better grasp the real legal challenges faced by U.S. government actors and encouraging those same government actors to draw upon the expertise available within the legal academy. The Center files this brief to promote accurate interpretation of international law in this case by providing the Court with an examination of prohibitory norms of international law that apply to corporations and other organizations.

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[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* or its counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office. The views expressed in this brief are not necessarily those of the Yale Law School or Yale University.

SUMMARY OF ARGUMENT

Petitioners' briefs contend that there is no basis for categorically excluding corporations or other organizations as defendants under the Alien Tort Statute (ATS), 28 U.S.C. § 1350, or the Torture Victim Protection Act of 1991 (TVPA), 28 U.S.C. § 1350 note. The Center agrees.

We submit this brief to address a related issue: whether *specific* prohibitory norms of international law apply to corporations.[2] ATS lawsuits commonly rest upon claimed violations of prohibitory norms such as genocide, crimes against humanity, torture, extrajudicial killing, war crimes, slavery, and piracy.[3] TVPA lawsuits similarly rest upon claimed violations of the prohibitory norms of torture and extrajudicial killing.

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[2] Throughout this brief, the arguments we make regarding corporations apply to other organizations as well, unless expressly indicated otherwise.

[3] See, *e.g.*, *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 720 (2004) (discussing claims cognizable under the ATS from its inception, including piracy); *Sarei* v. *Rio Tinto, PLC*, Nos. 02-56256, 02-56390, 09-56381, 2011 WL 5041927, at *17-20 (9th Cir. Oct. 25, 2011) (en banc) (crimes against humanity, genocide, war crimes), *petition for cert. filed*, No. 11-649 (Nov. 23, 2011); *Aziz* v. *Alcolac, Inc.*, 658 F.3d 388, 390 (4th Cir. 2011) (genocide); *Doe* v. *Exxon Mobil Corp.*, 654 F.3d 11, 16 (D.C. Cir. 2011) (crimes against humanity, extrajudicial killing, genocide, torture); *Kiobel* v. *Royal Dutch Petroleum*, 621 F.3d 111, 123 (2d Cir. 2010) (crimes against humanity, extrajudicial killing, torture), *cert. granted*, No. 10-1491 (Oct. 17, 2011); *Kadic* v. *Karadzic*, 70 F.3d 232, 236-237, 239 (2d Cir. 1995) (crimes against humanity, genocide, slavery, summary execution, torture, war crimes).

In this brief we show that each of these norms is specific, universal, and obligatory and that each of these norms extends to corporations. This specific, norm-by-norm analysis supports petitioners' arguments that corporations are not categorically excluded from liability under the ATS or the TVPA.

ARGUMENT

The norm-by-norm approach adopted in this brief follows upon this Court's observation that a consideration in determining whether an ATS case may proceed is whether "a given norm" extends "to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual." *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 732 n.20 (2004). Thus, as the en banc Ninth Circuit recently concluded, the inquiry "should consider *separately* each violation of international law alleged and which actors may violate it," *Sarei* v. *Rio Tinto, PLC*, Nos. 02-56256, 02-56390, 09-56381, 2011 WL 5041927, at *7 (9th Cir. Oct. 25, 2011) (en banc) (emphasis added), because "the handful of international law violations that may give rise to an ATS claim are often restricted by the identity of the perpetrator, the identity of the victim, or the locus of events." *Id.* at *43 (McKeown, J., concurring).

Some international law norms apply to the conduct of all actors. By contrast, some norms do not – for example, they may apply only to State actors or

those who act in concert with the State. "The particularity of each norm highlights the importance of conducting a norm-specific inquiry as to each alleged violation of international law" to determine if a claim may be maintained under the ATS. *Id.* at *44.

At the outset we note a critical difference between the *applicability* of an international law norm and whether *liability* should be imposed upon a party who violates an applicable norm. The *Kiobel* majority wrongly elided this distinction, conflating the absence of international law precedent holding corporations criminally liable with a conclusion that major prohibitory norms of international law have no application to what corporations do.[4]

Liability for violating a norm only exists where a court has jurisdiction over an actor to whom that norm applies. The ATS is a jurisdiction-granting statute.[5] *Sosa*, 542 U.S. at 712. In this sense, it serves

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[4] *Cf. Kiobel*, 621 F.3d at 152 (Leval, J., concurring only in judgment); *Exxon Mobil*, 654 F.3d at 50 (noting that "[t]he Second Circuit's approach overlooks the key distinction between norms of conduct and remedies").

[5] The ATS grants jurisdiction over a civil action by an alien for violations of certain well-established norms of international law. Given this jurisdictional grant, "international law extends the scope of liability to the perpetrator being sued," *Sosa*, 542 U.S. at 732 n.20, only if the international law norm extends to that perpetrator. This reading is supported by this Court's citation of two courts' discussions of the applicability of certain norms to the conduct of private actors. *Ibid.* (citing *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774, 791-795 (D.C. Cir. 1984) (Edwards, J., concurring) for the proposition that there was

(Continued on following page)

a similar role to the Rome Statute of the International Criminal Court (ICC), July 17, 1998, 2187 U.N.T.S. 90 (Rome Statute), or the Statutes of the International Criminal Tribunal for the Former Yugoslavia, May 25, 1993, 32 I.L.M. 1192 (ICTY Statute), and the International Criminal Tribunal for Rwanda, Nov. 8, 1994, 33 I.L.M. 1598 (ICTR Statute). These charters do not create substantive law; instead, they create jurisdiction for the relevant tribunals to try those who are alleged to have violated existing norms of international law.[6] Corporations are not liable before these tribunals because their charters extend jurisdiction only to "natural persons."[7]

The ATS also grants limited jurisdiction: it allows for a "civil action" filed by an "alien," "for a tort only." 28 U.S.C. § 1350. Moreover, it relies on international law to determine whether the tort is "committed in violation of the law of nations * * *." *Ibid.* The ATS,

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"insufficient consensus in 1984 that torture by private actors violates international law" and citing *Kadic*, 70 F.3d at 242, for the proposition that there was "sufficient consensus in 1995 that genocide by private actors violates international law"); see also *Kadic* 70 F.3d at 242 ("The *applicability* of this norm to private individuals is also confirmed by the Genocide Convention Implementation Act * * *.") (emphasis added).

[6] See, *e.g.*, U.N. Secretary-General, *Rep. of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, ¶ 29, U.N. Doc. S/25704 (May 3, 1993); *Prosecutor* v. *Tadic*, Case No. IT-94-1-T, Judgment, ¶¶ 662, 669 (ICTY May 7, 1998); Rome Statute art. 5, ¶ 1.

[7] See Rome Statute art. 25(1); ICTY Statute art. 6; ICTR Statute art. 5.

however, contains no limitation on who may be sued. Accordingly, when an ATS suit is filed against a corporation, whether there is an actionable "violation of the law of nations" depends in part on whether the particular international law norm at issue is capable of being violated by a corporation.

This brief focuses solely on the applicability of specific international law norms to corporate conduct. It does not address the separate issue of whether a corporation may be accountable not only as a principal actor but also as an aider-and-abettor, a co-conspirator, or under other forms of accessory liability. See Kiobel Pet. Br. 39, n.31 (reserving the issue of whether the ATS applies to corporate aiding-and-abetting of other actors who violate international norms). For similar reasons, this brief does not address the question of how a corporation satisfies the elements of liability – such as the state of mind element – for a particular offense.

This brief conducts a norm-by-norm analysis of seven major prohibitory norms of international law: genocide, crimes against humanity, torture, extra-judicial killing, war crimes, slavery, and piracy. It, first, defines the contours of these prohibitions, showing that they are sufficiently specific, universal, and obligatory to meet the requirements set out in *Sosa*, and, second, shows that the prohibitions apply to corporations.

This norm-by-norm analysis supports petitioners' broader contention that corporations are not

categorically excluded from the universe of parties who may be held liable under the ATS and the TVPA.

I. THE PROHIBITION OF GENOCIDE IS A SPECIFIC, UNIVERSAL, AND OBLIGATORY INTERNATIONAL LAW NORM THAT EXTENDS TO CORPORATIONS.

A. The Genocide Prohibition Is A Specific, Universal, And Obligatory Norm.

Genocide is defined as an act "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group." Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) art. 2, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277 (1949). This definition is common to all relevant international instruments, which identically limit the norm to a set of specific enumerated acts. See Rome Statute art. 6; ICTY Statute art. 4; ICTR Statute art. 2. The Genocide Convention, to which 142 states are party, including the United States, affirms that genocide is "a crime under international law." Genocide Convention art. 1; Status of the Convention on the Prevention and Punishment of the Crime of Genocide, United Nations Treaty Collection (Dec. 13, 2011), http://treaties.un.org/Pages/ViewDetails.aspx?src=UNTSONLINE&tabid=2&mtdsg_no=IV-1&chapter=4&lang=en

The International Court of Justice (ICJ) has found genocide to be a peremptory – or *jus cogens* – norm from which no derogation is permitted. *Application of*

Convention on Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro) (*Bosnian Genocide*), 2007 I.C.J. 43, ¶ 161 (Feb. 26). Since Nuremberg, almost every international criminal tribunal has prosecuted individuals for genocide. See, *e.g.*, *Prosecutor* v. *Blagojevic*, Case No. IT-02-60-A, Judgment (ICTY May 9, 2007); *Prosecutor* v. *Rutaganda*, Case No. ICTR IT-96-3-T, Judgment (Dec. 6, 1999).

Similarly, U.S. courts have consistently understood genocide to be a violation of customary international law. This Court in *Sosa* noted approvingly the Second Circuit's view that there is "sufficient consensus * * * that genocide by private actors violates international law." *Sosa*, 542 U.S. at 732 n.20 (citing *Kadic* v. *Karadzic*, 70 F.3d 232, 239-241 (2d Cir. 1995)). Justice Breyer further noted both "substantive agreement" that genocide is "universally condemned behavior" under international law and "procedural agreement that universal jurisdiction exists to prosecute" cases of genocide wherever they may occur. *Id.* at 762 (Breyer, J., concurring in part and concurring in the judgment); see also *Sarei*, 2011 WL 5041927, at *19 (noting that "the *jus cogens* prohibition of genocide is sufficiently specific, universal, and obligatory to give rise to an ATS claim").

B. The Genocide Prohibition Extends To Corporations.

All international instruments that prohibit genocide define it according to prohibited acts, without reference to actor. See Genocide Convention art. 2; Rome Statute art. 6; ICTY Statute art. 4; ICTR Statute art. 2. The prohibition clearly applies to non-state actors. The Genocide Convention explicitly provides that "[p]ersons committing genocide * * * shall be punished, whether they are constitutionally responsible rulers, public officials or *private* individuals." Genocide Convention art. 4 (emphasis added). The Second Circuit recognizes that the prohibition "applie[s] equally to state and non-state actors," and that the Genocide Convention's implementing legislation "criminalizes acts of genocide without regard to whether the offender is acting under color of law." *Kadic*, 70 F.3d at 242.

The ICJ, the authoritative interpreter of the Genocide Convention,[8] has explained that genocide can be committed by non-state actors including private entities. In *Bosnian Genocide*, the ICJ discussed "persons *or entities* that committed the acts of genocide at Srebrenica." 2007 I.C.J. 43, ¶ 393 (emphasis added). In an earlier order, it had instructed the Yugoslav government to "ensure 'that any military,

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[8] See Genocide Convention art. 9 ("Disputes * * * relating to the interpretation, application, or fulfilment of the present Convention * * * shall be submitted to the International Court of Justice * * *.").

paramilitary or irregular armed units * * * as well as any *organizations* and persons which may be subject to its control, direction or influence, do not commit any acts of genocide * * *.'" *Bosnian Genocide*, 1993 I.C.J. 3, ¶ 52 (Apr. 8) (emphasis added). It is therefore clear that the ICJ considers genocide committed by non-state entities a "'crime under international law.'" *Id.* ¶ 45 (quoting Genocide Convention art. 1); see also *Sarei*, 2011 WL 5041927, at *20 ("[L]oosely affiliated groups such as paramilitary units may commit genocide, particularly in light of consistent case law indicating that genocide does not require state action.").

The ICTR has explicitly extended the genocide norm to corporations. In *Prosecutor* v. *Nahimana*, Case No. ICTR 99-52-T, Judgment (Dec. 3, 2003), the Trial Chamber held that the radio station RTLM, a corporate entity, *id.* ¶ 552, incited genocide through broadcasts. *Id.* ¶¶ 949, 952-953. One company director was found guilty of genocide for "his active engagement in the management of RTLM" and "failure to take necessary and reasonable measures to prevent the killing of Tutsi civilians instigated by RTLM." *Id.* ¶ 973. Another director was found guilty of genocide because he was "the founder and principal ideologist of RTLM," and he used RTLM as his "weapon of choice * * * to instigate the killing of Tutsi civilians." *Id.* ¶ 974. Although the ICTR's criminal jurisdiction extends only to individuals, the Trial Chamber made clear that a company, RTLM, violated the international norm against genocide.

In short, the prohibition against genocide extends to non-state organizations, including corporations. "Given that an amorphous group, a state, and a private individual may all violate the *jus cogens* norm prohibiting genocide, corporations likewise can commit genocide under international law because the prohibition is universal." *Sarei*, 2011 WL 5041927, at *20.

II. THE PROHIBITION OF CRIMES AGAINST HUMANITY IS A SPECIFIC, UNIVERSAL, AND OBLIGATORY INTERNATIONAL LAW NORM THAT EXTENDS TO CORPORATIONS.

A. The Crimes Against Humanity Prohibition Is A Specific, Universal, And Obligatory Norm.

International law recognizes a universal prohibition of crimes against humanity, defined as the commission of a prohibited act with knowledge that it is part of a widespread or systematic attack directed against a civilian population.[9] Prohibited acts include

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[9] Although the "widespread or systematic attack" requirement does not appear in the ICTY Statute, it is clear in the tribunal's jurisprudence. See, *e.g.*, *Prosecutor* v. *Deronjic*, Case No. IT-02-61-A, Judgment, ¶ 109 (ICTY July 20, 2005). The Rome Statute requires a "widespread or systematic attack" and defines such an attack as involving a state or organizational policy. Rome Statute art. 7. Such a policy requirement, however, is not universally accepted. *Prosecutor* v. *Kunarac*, Case No. IT-96-23-A, Judgment, ¶ 98 (ICTY June 12, 2002) ("[N]either the attack nor the acts of the accused needs to be supported by any form of 'policy' or 'plan.'").

murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecution, and other inhumane acts. See, *e.g.*, Rome Statute art. 7; ICTY Statute art. 5; ICTR Statute art. 3.

The prohibition of crimes against humanity dates from Nuremberg. Nuremburg Charter art. 6(c), Aug. 8, 1945, 59 Stat. 1546, 82 U.N.T.S. 282. The norm has been repeatedly reaffirmed in international instruments and the charters of international tribunals. See, *e.g.*, Convention on the Non-Applicability of Statutory Limits to War Crimes and Crimes Against Humanity, Nov. 26, 1968, 754 U.N.T.S. 73; Rome Statute art. 7; ICTY Statute art. 5; ICTR Statute art. 3; see also *Prosecutor* v. *Tadic*, Case No. IT-94-1-T ¶ 623 (ICTY May 7, 1997) (noting that the customary status of the prohibition has "not been seriously questioned" since Nuremburg).

U.S. courts have also recognized the prohibition of crimes against humanity as a universally accepted norm. See, *e.g.*, *Flores* v. *Southern Peru Copper Corp.*, 414 F.3d 233, 244 n.18 (2d Cir. 2003) (recognizing "[c]ustomary international law rules proscribing crimes against humanity"); *Quinn* v. *Robinson*, 783 F.2d 776, 799 (9th Cir. 1986) ("Crimes against humanity, such as genocide, violate international law * * *."). Moreover, Justice Breyer placed crimes against humanity within the subset of norms on which there is "substantive agreement as to certain universally condemned behavior," and "procedural agreement that universal jurisdiction exists to prosecute * * * that

behavior." *Sosa*, 542 U.S. at 762 (Breyer, J., concurring in part and concurring in the judgment).

B. The Crimes Against Humanity Prohibition Extends To Corporations.

Corporations are capable of committing crimes against humanity. The customary international law norm depends on the act itself, rather than the identity of the perpetrator. The Rome Statute makes clear that a "'crime against humanity' means *any* of the [enumerated] *acts*" and makes no distinction as to the actor responsible. Rome Statute art. 7(1) (emphasis added). Both the ICTY and the ICTR Statutes refer to "the following crimes [when directed against] any civilian population," and do not limit the definition of the crime to a particular actor. ICTY Statute art. 5; ICTR Statute art. 3.

International criminal jurisprudence dating from Nuremberg demonstrates that the prohibition of crimes against humanity includes groups and organizations. The Nuremberg Charter states that the "Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a *criminal organization*." Nuremburg Charter art. 9 (emphasis added); see also Control Council Law No. 10 art. 2(2), *Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity*, Dec. 20, 1945, *reprinted in* 1 *Enactments and Approved Papers of the Control Council and Coordinating*

Committee 306 (1945) ("Any person * * * is deemed to have committed a crime as defined in paragraph 1 of this Article [including crimes against humanity], if he was * * * a member of any organization or group connected with the commission of any such crime.").[10]

Modern jurisprudence further shows that non-state groups and organizations can violate the prohibition of crimes against humanity. The ICTY has held that crimes against humanity can be committed by groups and organizations. *Tadic*, ¶ 654 ("[C]rimes against humanity can be committed * * * by a terrorist group or organization"). The crimes must be part of a widespread or systematic attack; however, "only the attack, not the individual acts * * * must be widespread or systematic," and the attack need not be "adopted formally as the policy of a state." *Prosecutor* v. *Kunarac*, Case No. IT-96-23-A, Judgment, ¶ 96 (ICTY June 12, 2002); see also *Prosecutor* v. *Akayesu*, Case No. ICTR 96-4-T, Judgment, ¶ 580 (Sept. 2, 1998). The requirement may thus be met where a non-state entity acts as part of an attack by an actor exercising territorial control. *Tadic*, ¶ 654.

The post-World War II tribunals demonstrate that the norm extends to corporations in particular. The Nuremberg tribunals recognized that corporate conduct could violate the prohibition on crimes against

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[10] The Allied Control Council was the governing body of the military occupation of Germany after World War II ended in Europe.

humanity. Twenty-three executives at I.G. Farben, a corporation responsible for the production of Zyklon B gas used at Auschwitz, were charged for "collective[ ]" actions utilizing the "instrumentality" of Farben. *United States* v. *Krauch (Farben Case)*, 8 *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10*, at 1166 (1981).

In short, the crimes against humanity prohibition extends to non-state groups and organizations. Corporations are therefore capable of violating the crimes against humanity prohibition.

III. THE PROHIBITION OF TORTURE IS A SPECIFIC, UNIVERSAL, AND OBLIGATORY INTERNATIONAL LAW NORM THAT EXTENDS TO CORPORATIONS.

A. The Torture Prohibition Is A Specific, Universal, And Obligatory Norm.

Torture is generally defined as the infliction of physical or mental pain or suffering, for a prohibited purpose (such as obtaining information or a confession), "by or at the instigation of or with the consent or acquiescence of" a state actor. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) art. 1, ¶ 1, Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85.

Torture is universally prohibited by customary international law. The Universal Declaration of Human Rights (UDHR) mandates that "[n]o one shall be

subjected to torture." UDHR art. 5, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948). Similarly, the International Covenant on Civil and Political Rights (ICCPR) states, "No one shall be subjected to torture * * *." ICCPR art. 7, Dec. 16, 1966, S. Exec. Doc. E, 95-2 (1978), 999 U.N.T.S. 171. Confirming the customary international norm against torture, 149 states, including the United States, have joined the CAT. Status of the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, United Nations Treaty Collection (Dec. 13, 2011), http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en

The UDHR, the ICCPR, and the CAT are but a few of numerous international instruments that prohibit torture.[11] In short, "[t]orture is prohibited under both conventional and customary international law," and "can be said to constitute a norm of *jus cogens*." *Prosecutor* v. *Kunarac*, Case No. IT-96-23-T, Trial Judgment, ¶ 466 (ICTY Feb. 22, 2001) (internal footnotes omitted).

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[11] See Inter-American Convention to Prevent and Punish Torture, adopted Dec. 9, 1985, O.A.S. T.S. No. 67; African Charter on Human and Peoples' Rights art. 5, June 27, 1981, 1520 U.N.T.S. 217; Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 3452 (XXX), annex, U.N. GAOR, 30th Sess., Supp. No. 34, U.N. Doc. A/10034, at 91 (Dec. 9, 1975); American Convention on Human Rights art. 5, § 2, Nov. 22, 1969, 1144 U.N.T.S. 123; European Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Nov. 4, 1950, 213 U.N.T.S. 221.

U.S. courts and authorities also recognize that the prohibition against torture is universal, specific, and obligatory. See, *e.g.*, *Siderman de Blake* v. *Argentina*, 965 F.2d 699, 717 (9th Cir. 1992) (indicating that freedom from "official torture is fundamental and universal, a right deserving of the highest status under international law, a norm of *jus cogens*"); *Filartiga* v. *Pena Irala*, 630 F.2d 876, 883 (2d Cir. 1980) ("[W]e have little difficulty discerning [torture's] universal renunciation in the modern usage and practice of nations."); see also *Sosa*, 542 U.S. at 762 (Breyer, J., concurring in part and concurring in the judgment) (identifying torture among the subset of "universally condemned behavior" and noting the procedural agreement that universal jurisdiction exists); Restatement (Third) of Foreign Relations Law § 702 (1987) (Restatement) (listing the torture prohibition as part of the "Customary International Law of Human Rights").

B. The Torture Prohibition Extends To Corporations.

The international norm against torture applies to all actors equally, provided a State official at least acquiesces or the torture occurs under color of law. CAT art. 1; *Kadic*, 70 F.3d at 243-245. That the torture prohibition extends not just to direct State action but also to action to which the State has acquiesced indicates that non-state actors can violate the norm. Indeed, the UDHR categorically prohibits torture and provides that "[n]othing in the Declaration may be interpreted as implying for any State, group or person

any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein." UDHR art. 30.

The CAT requires that the pain or suffering must be "inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity," but it imposes no limitation on who can commit such acts. CAT art. 1. The Convention requires that each member state enact criminal penalties for torture and that criminal penalties "shall apply * * * to an act by *any* person which constitutes complicity or participation in torture." *Id.* art. 4 (emphasis added). Moreover, none of the many other international treaties that prohibit torture exclude non-state actors. See *supra* note 11 (citing international instruments prohibiting torture).

The authoritative adjudicator and interpreter of the CAT, the United Nations Committee Against Torture, expressly acknowledges that non-state actors are capable of committing torture in violation of international law. The Committee explains that State failure to provide remedies to torture victims "enables non-State actors to commit acts impermissible under the Convention with impunity." Committee Against Torture, General Comment No. 2 ¶ 18, U.N. Doc. CAT/C/GC/2 (Jan. 24, 2008). It further discusses "acts of torture * * * committed by non-State officials or private actors" and argues that "the State bears responsibility" where it fails "to exercise due diligence to prevent, investigate, prosecute, and punish such

non-State officials or private actors" for violating the torture prohibition. *Id.* ¶ 18.

The torture norm applies to non-state groups and institutions. The UDHR denies that "any State, *group* or person" can impair "the rights and freedoms set forth herein," UDHR art. 30 (emphasis added), including the freedom that "[n]o one shall be subjected to torture." *Id.* art. 5. The Committee Against Torture interprets the norm to bind institutions, including private ones. See, *e.g.*, General Comment No. 2 ¶ 15.

Furthermore, the U.S. State Department has routinely acknowledged that non-state groups and organizations have engaged in torture. See, *e.g.*, U.S. Dep't of State, *Democratic Republic of the Congo: Country Reports on Human Rights Practices* (Feb. 23, 2000) (citing credible reports that "Mai Mai groups fighting on the side of the Government committed * * * torture * * * of civilians"); U.S. Dep't of State, *Sri Lanka: Country Reports on Human Rights Practices* (Mar. 4, 2002) ("[T]wo former Tamil terrorist organizations aligned with the former PA Government * * * have been implicated in cases involving extrajudicial killing [and] torture.").

In short, the prohibition against torture extends to non-state individuals, organizations, and groups, provided that the pain or suffering is inflicted with the acquiescence of a State actor or under color of law. Thus, corporations are capable of violating the prohibition against torture.

IV. THE PROHIBITION OF EXTRAJUDICIAL KILLING IS A SPECIFIC, UNIVERSAL, AND OBLIGATORY INTERNATIONAL LAW NORM THAT EXTENDS TO CORPORATIONS.

A. The Extrajudicial Killing Prohibition Is A Specific, Universal, And Obligatory Norm.

Extrajudicial killing is the arbitrary deprivation of life, committed by or in concert with the State or under color of law. It includes all deliberate killing by the State or persons acting with its authority, consent, or acquiescence, except when carried out as lawful punishment pursuant to due process or as necessary in exigent circumstances. See Restatement § 702 cmt. f.

The prohibition against extrajudicial killing is a universal and obligatory norm of international law. The UDHR establishes the "right to life." UDHR art. 3. Its corollary – the right to freedom from arbitrary deprivation of life – is reaffirmed in the ICCPR, as well as in numerous regional human rights instruments. ICCPR art. 6(1); African Charter on Human and Peoples' Rights art. 4, June 27, 1981, 1520 U.N.T.S. 217; American Convention on Human Rights art. 4, Nov. 22, 1969, 1144 U.N.T.S. 123; European Convention for the Protection of Human Rights and Fundamental Freedoms art. 2, Nov. 4, 1950, 213 U.N.T.S. 221. In addition, international humanitarian law prohibits arbitrary execution of protected persons during non-international armed conflicts. Geneva

Convention Relative to the Treatment of Prisoners of War art. 3 (Common Article 3), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

International law specifically provides the minimum judicial protections necessary for an execution to be non-arbitrary. Those protections include the right to a "fair and public hearing by a competent, independent and impartial tribunal established by law," as well as the presumption of innocence, the right to be present at trial, the right to counsel, the right to appellate review, and the privilege against self-incrimination. ICCPR art. 14. These core provisions constitute the "judicial guarantees which are recognized as indispensable by civilized peoples." Common Article 3.

U.S. courts treat the prohibition against extrajudicial killing (or summary execution) as firmly established in the law of nations. See, *e.g.*, *Doe* v. *Exxon Mobil Corp.*, 654 F.3d 11, 17 (D.C. Cir. 2011) (noting the parties' agreement that "extrajudicial killing, torture, and prolonged arbitrary detention are clearly established norms of international law"); *Cabello* v. *Fernandez-Larios*, 402 F.3d 1148, 1157-1158 (11th Cir. 2005) (noting conclusions of courts that "where a defendant has been found directly or secondarily responsible for acts of torture or extrajudicial killing, the acts are in violation of the law of nations"); *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774, 791 n.20 (D.C. Cir. 1984) (Edwards, J., concurring) (noting the views of commentators that "at least four acts [are]

subject to unequivocal international condemnation: torture, summary execution, genocide and slavery").

B. The Extrajudicial Killing Prohibition Extends To Corporations.

The prohibition of extrajudicial killing applies to all actors, as long as the perpetrator acts with the acquiescence of the State or under color of law. The U.N. Economic and Social Council, for example, has directed that extrajudicial killing "shall not be carried out under any circumstances including * * * *by a person acting at the instigation, or with the consent or acquiescence of*" a public official. Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions, E.S.C. Res. 1989/65, U.N. Doc. E/RES/1989/65 (May 24, 1989) (emphasis added).

The U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions (Special Rapporteur) has concluded that "both state and non-state actors can commit extrajudicial executions." Special Rapporteur, *Mission to the Philippines*, Human Rights Council, ¶ 5, U.N. Doc. A/HRC/8/3/Add.2 (Apr. 16, 2008). The Special Rapporteur distinguishes between isolated private killings – "a domestic crime [that] does not give rise to State responsibility" – and private killings that implicate State responsibility. Special Rapporteur, *Report*, Human Rights Council, ¶ 46(d), U.N. Doc. A/HRC/14/24 (May 20, 2010) (Rep. of the Special Rapporteur). The latter may involve "groups

which, although not government officials as such, nonetheless operate at the behest of the Government, or with its knowledge or acquiescence." Special Rapporteur, *Civil and Political Rights, Including Questions of Disappearances and Summary Executions*, Comm'n on Human Rights, ¶ 69, U.N. Doc. E/CN.4/2005/7 (Dec. 22, 2004). Hence incidents such as "killings by rebel and insurgent groups, paramilitary groups, militias, vigilantes, death squads, criminal gangs, bandits, mobs, family members and private individuals" could qualify as extrajudicial executions if committed with the knowledge or acquiescence of the State. Rep. of the Special Rapporteur, ¶ 45. In this respect, the prohibitory norm against extrajudicial killing resembles the prohibitory norm against torture. See *supra* Part III.B.

International courts confirm that non-state actors are capable of committing extrajudicial killings. For example, the Inter-American Court of Human Rights held Colombia responsible for a massacre carried out by an independent paramilitary group with the "support or tolerance" of public authorities. *Case of the "Mapiripán Massacre" v. Colombia*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 134, ¶¶ 110, 123, 138 (Sept. 15, 2005). The European Court of Human Rights found the United Kingdom in breach of its duty where it failed to carry out an independent investigation into an alleged killing by an "illegal loyalist paramilitary group," explaining that the State's duty to investigate extrajudicial killings "is not confined to cases where it has been established that the killing was caused by

an agent of the State." *Finucane* v. *United Kingdom*, 2003-VIII Eur. Ct. H.R. ¶¶ 10, 84. Similarly, in *Prosecutor* v. *Kayishema*, the ICTR applied Amnesty International's definition of extrajudicial killing as "unlawful and deliberate killings carried out with the order of a Government *or with its complicity or acquiescence*." Case No. ICTR 95-1-T, Judgment, ¶ 140 (May 21, 1999) (emphasis added). While that case involved allegations of crimes against humanity, the court's holding extended to unlawful killings – *i.e.*, extrajudicial killings. Each of these courts recognized that the prohibition against extrajudicial killing can apply to the conduct of non-state actors.

The norm against extrajudicial killing extends to all non-state actors, including corporations. The Special Rapporteur included corporate activity among examples of the conduct of non-state actors implicated in extrajudicial killings. See, *e.g.*, Special Rapporteur, *Mission to Nigeria*, Comm'n on Human Rights, ¶ 86, U.N. Doc. E/CN.4/2006/53/Add.4 (Jan. 7, 2006) ("Oil companies have long been accused of complicity in actions involving human rights violations including extrajudicial executions."); Special Rapporteur, *Communications to and from Governments*, Human Rights Council, 308-310, U.N. Doc. A/HRC/8/3/Add.1 (May 30, 2008) (reporting shooting of local residents by private security forces at a gold mine and Papua New Guinea's subsequent failure to investigate). These reports support the conclusion that corporations, like other non-state actors, are capable of violating the international law prohibition on extrajudicial killing.

In short, the prohibition of extrajudicial killing extends to the conduct of a variety of non-state actors, provided that the conduct occurs with the acquiescence of a State actor or under color of law. Accordingly, corporations are capable of violating the prohibition against extrajudicial killing.

V. THE PROHIBITION OF WAR CRIMES IS A SPECIFIC, UNIVERSAL, AND OBLIGATORY INTERNATIONAL LAW NORM THAT EXTENDS TO CORPORATIONS.

A. The War Crimes Prohibition Is A Specific, Universal, And Obligatory Norm.

War crimes are serious violations of international humanitarian law (the law of war). The Geneva Conventions, which protect those not taking active part in hostilities against inhumane treatment, are a principal source of the law of war. More than 180 nations, including the United States, have agreed to the definition of war crimes set forth in Common Article 3 of the Geneva Conventions. See *Sarei*, 2011 WL 5041927, at *23-24. Other treaties also define specific war crimes. See, *e.g.*, Rome Statute art. 8 (consolidating war crimes as defined by prior treaties and international custom); ICTY Statute arts. 2-3; ICTR Statute art. 4.

The prohibition of war crimes is universal and obligatory. See, *e.g.*, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, 1996 I.C.J. 226, ¶¶ 79-81 (July 8); *Military and Paramilitary*

Activities in and Against Nicaragua (Nicar. v. *U.S.)*, Judgment, 1986 I.C.J. 14, ¶ 218 (June 27); Restatement § 404.

U.S. courts have also concluded that the prohibition of war crimes is a universal, specific, and obligatory norm of customary international law. See, *e.g.*, *Sarei*, 2011 WL 5041927, at *23-24; *Kiobel* v. *Royal Dutch Petroleum*, 621 F.3d 111, 120 (2d Cir. 2010); see also *Sosa*, 542 U.S. at 762 (Breyer, J., concurring in part and concurring in the judgment) (noting war crimes as an example of "universally condemned behavior" for which "universal jurisdiction exists to prosecute").

B. The War Crimes Prohibition Extends To Corporations.

The major instruments defining war crimes describe them solely in terms of prohibited conduct, without specifying the actor. See, *e.g.*, Rome Statute art. 8; ICTY Statute art. 3; ICTR Statute art. 4; Control Council Law No. 10 art. 2.

Non-state actors are capable of engaging in war crimes. Common Article 3 of the Geneva Conventions necessarily binds non-state actors because it governs *non*-international armed conflicts, which presupposes at least one actor that is *not* a state. Common Article 3.

U.S. courts have recognized that non-state actors are capable of committing war crimes. *Sarei*, 2011 WL

5041927, at *24 ("Because parties to a conflict not of an international character by definition must include at least one non-state actor, entity, or group, Common Article III cannot reasonably be interpreted to be limited to states."); *Sinaltrainal* v. *Coca-Cola, Inc.*, 578 F.3d 1252, 1257 (11th Cir. 2009) ("Some acts, such as torture and murder committed in the course of war crimes, violate the law of nations regardless of whether the perpetrator acted under color of law of a foreign nation or only as a private individual."); *Kadic*, 70 F.3d at 243 (noting that "[t]he liability of private individuals for committing war crimes has been recognized since World War I and was confirmed at Nuremberg after World War II, and remains today an important aspect of international law") (internal citations omitted).

The Nuremberg Charter demonstrates that the prohibition of war crimes was understood to apply to organizations. Article 9 provides: "At the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization." Nuremberg Charter art. 9. In a case trying a member of an organization the Tribunal has deemed criminal, "the criminal nature of the group or organization is considered proved and shall not be questioned." *Id.* art. 10.

The record of the Nuremberg Trials confirms that *corporations* committed war crimes. Control Council Law No. 10 includes "plunder of public or private

property" as a war crime. Control Council Law No. 10 art. 2(b). In the *I.G. Farben* trial, the Tribunal explained that such plunder, whether committed by a natural or juridical person, violates the law of war:

> Where private individuals, *including juristic persons*, proceed to exploit the military occupancy by acquiring private property against the will and consent of the former owner, such action, not being expressly justified * * * is in violation of international law. * * * Similarly where a private individual *or a juristic person* becomes a party to unlawful confiscation of public or private property by planning and executing a well-defined design to acquire such property permanently, acquisition under such circumstances subsequent to the confiscation constitutes conduct in violation of [the law of war].

Farben Case, at 1135 (emphasis added). The Tribunal then found that "the proof establishes beyond a reasonable doubt that offenses against property as defined in Control Council Law No. 10 were committed by Farben." *Id.* at 1139. It further noted that "[t]he action of Farben and its representatives * * * cannot be differentiated from acts of plunder or pillage committed by officers, soldiers, or public officials of the German Reich." *Ibid.* The Tribunal attributed the act of plunder to Farben itself, not just its representatives.

As detailed further below, *infra* Part VI.B, the Tribunal similarly found that corporations committed

war crimes by exploiting slave labor. *Farben Case*, at 1173-1174. In the Krupp trial,[12] the Tribunal found that "throughout German industry in general, and the firm of Krupp and its subsidiaries in particular, prisoners of war * * * were employed in armament production in violation of the laws and customs of war." *United States* v. *Krupp (Krupp Case)*, 9 *Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10*, at 1376 (1950).

In short, the prohibition against war crimes extends to non-state actors, groups, and organizations. As the historical record from Nuremberg shows, juridical entities such as corporations are fully capable of violating the prohibition against war crimes.

VI. THE PROHIBITION OF SLAVERY IS A SPECIFIC, UNIVERSAL, AND OBLIGATORY INTERNATIONAL LAW NORM THAT EXTENDS TO CORPORATIONS.

A. The Slavery Prohibition Is A Specific, Universal, And Obligatory Norm.

International law has long prohibited slavery, which is defined as the exercise of any or all of the

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[12] Krupp was a corporation from 1903 to December 1943, after which it operated as an unincorporated, privately-owned firm. *United States* v. *Krupp* (*Krupp Case*), 9 *Trials of War Criminals Before the Nuernberg Military Tribunals* 1332 (1950). Krupp's use of concentration camp labor began in 1942, when it was still incorporated. *Id.* at 1412.

powers attaching to the right of ownership over a human being. Slavery Convention art. 1, Sept. 25, 1926, 46 Stat. 483, 60 L.N.T.S. 254. The international ban on slavery dates back at least to the Slavery Convention of 1926, which committed state parties to bring about "the complete abolition" of slavery. *Id.* art. 2. Subsequent instruments of international human rights and criminal law unanimously condemn slavery. See, *e.g.*, UDHR art. 4; ICCPR art. 8; Rome Statute art. 7; ICTY Statute art. 5; ICTR Statute art. 3; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, *done* Sept. 7, 1956, 18 U.S.T. 3201, 226 U.N.T.S. 3; U.N. Protocol to Prevent, Suppress and Punish Trafficking in Persons (Trafficking Protocol) art. 3, Nov. 15, 2000, 2237 U.N.T.S. 319 (committing states to criminalize trafficking in persons "for the purpose of exploitation," including "slavery or practices similar to slavery").

U.S. courts have recognized that the slavery prohibition is a *jus cogens* norm. *Kadic*, 70 F.3d at 239 (finding that slave trade violates the law of nations "whether undertaken by those acting under the auspices of a state or only as private individuals"); *Comm. of U.S. Citizens Living in Nicar.* v. *Reagan*, 859 F.2d 929, 941 (D.C. Cir. 1988) (noting prohibition of slavery among *jus cogens* norms); see also Restatement § 702(b) ("A state violates international law if, as a matter of state policy, it practices, encourages, or condones * * * slavery or slave trade.").

B. The Slavery Prohibition Extends To Corporations.

The prohibition against slavery applies to private actors, and it is not restricted to natural persons. International human rights treaties refer to the right to be free of slavery as a universal human right irrespective of the perpetrator. See, *e.g.*, ICCPR art. 8 ("No one shall be held in slavery; slavery and the slave-trade *in all their forms* shall be prohibited." (emphasis added)). International criminal law defines the crime of enslavement by the nature of the act, not the identity of the perpetrator. See, *e.g.*, Rome Statute art. 7(2) (defining "enslavement" as "the exercise of any or all of the powers attaching to the right of ownership over a person"). No international legal instrument purports to limit the norm against slavery to any particular class of perpetrator.

On the contrary, international law explicitly contemplates application of the norm to organizations and to groups of non-state actors. Human rights instruments recognize the central role that organized criminal enterprises play in human trafficking – a practice inextricably linked with modern-day slavery – and include those enterprises in their prohibitions. The U.N. Trafficking Protocol, for example, applies to offences that are "transnational in nature *and involve an organized criminal group*." Trafficking Protocol art. 4 (emphasis added); see also ASEAN Declaration Against Trafficking in Persons Particularly Women and Children, Nov. 29, 2004, *available at* http://www.asean.org/16793.htm (committing member states to

"undertake coercive actions/measures against individual[s] *and/or syndicate[s]* engaged in trafficking in persons" (emphasis added)).

The Council of Europe Convention on Action Against Trafficking in Human Beings, May 16, 2005, C.E.T.S. 197, explicitly refers to corporate liability for human trafficking. It includes an article titled "corporate liability," which commits member states to "ensure that a legal person can be held liable for a criminal offence established in accordance with this Convention." *Id.* art. 22. Corporate liability may be "criminal, civil or administrative," depending on the member state's legal systems. *Ibid.*

Indeed, corporate culpability for slavery has been acknowledged since Nuremberg. The trials of corporate officers demonstrate that the tribunal understood the prohibition on slavery to extend to corporate entities. In the Farben trial, for example, the tribunal declared that the corporation *itself* had violated international law:

> Farben * * * utilized involuntary foreign workers in many of its plants. It is enough to say here that the utilization of forced labor, unless done under such circumstances as to relieve the employer of responsibility, constitutes a violation of [international law].

Farben Case, at 1173-1174.

Similarly, in the trial of officers of the Krupp firm, the tribunal implied that the corporation *itself*

was culpable in the exploitation of slave labor at Auschwitz:

> In June 1943, the Krupp firm started to employ concentration camp inmates at Auschwitz. * * * The facts connected with Auschwitz clearly show not only the use of concentration camp labor, but also the desire to do so. They permit no opportunity for the conclusion that this labor was forced upon the Krupp firm.

Krupp Case, at 1415-1416. The tribunal concluded that "it is obvious" that "the employment of these concentration camp inmates was * * * a violation of international law * * *." *Id.* at 1434.

These companies were not criminally prosecuted by the International Military Tribunal; instead the Control Council dissolved them before the trials were initiated. See Control Council Law No. 9, *Providing for the Seizure of Property Owned by I.G. Farbenindustrie and the Control Thereof*, Nov. 30, 1945, *reprinted in* 1 *Enactments and Approved Papers of the Control Council and Coordinating Committee* 225 (1945); General Order No. 3 (Pursuant to Military Government Law No. 52 – Blocking and Control of Property): Firma Friedrich Krupp, *Military Government Gazette, Germany, British Zone of Control*, No. 5, at 62 (1945).

In short, the prohibition of slavery extends not merely to states but also to non-state groups and organizations, including corporations. Regardless of the

remedy sought, the Nuremberg proceedings leave no doubt that corporations are capable of violating the international law prohibition of slavery.

VII. THE PROHIBITION OF PIRACY IS A SPECIFIC, UNIVERSAL, AND OBLIGATORY INTERNATIONAL LAW NORM THAT EXTENDS TO CORPORATIONS.

A. The Piracy Prohibition Is A Specific, Universal, And Obligatory Norm.

Piracy is a long-recognized prohibitory norm of international law from which no derogation is permitted. M. Cherif Bassiouni, *International Crimes*: Jus Cogens *and* Obligatio Erga Omnes, 59 Law & Contemp. Probs. 63, 68 (1996). It is specifically defined as illegal violence, detention, or depredation, committed by the crew or passengers of a private vessel for private purposes, on the high seas or beyond the jurisdiction of any state. Voluntary participation in operating a pirate vessel, or inciting or intentionally facilitating piracy, also violates the norm. United Nations Convention on the Law of the Sea (UNCLOS) art. 101, Dec. 10, 1982, 1833 U.N.T.S. 397.

UNCLOS sets forth the modern legal framework prohibiting piracy, see *id.* arts. 100-107, and 162 states have ratified the treaty. Status of the United Nations Convention on the Law of the Sea, United Nations Treaty Collection (Dec. 13, 2011), http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXI~6&chapter=21&Temp=mtdsg3&lang=en

UNCLOS reflects the historical understanding that piracy is both universally wrong and subject to universal jurisdiction. International Law Association, *Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses* 3 (2000). The treaty thus places an affirmative duty on states to combat piracy, and permits states to exercise jurisdiction over pirate vessels on the high seas or outside the jurisdiction of another state. UNCLOS arts. 100, 105.[13]

This Court has not only acknowledged piracy to be a violation of customary international law but also to be one of the "historical paradigms," which the ATS was enacted to redress. *Sosa*, 542 U.S. at 715, 732; see also *Ali Shafi* v. *Palestinian Auth.*, 642 F.3d 1088, 1096 (D.C. Cir. 2011) ("[T]hat piracy is among the core causes of action contemplated by Congress in enacting the ATS appears beyond dispute * * *.").

For nearly two centuries, this Court has acknowledged piracy to be "an offence against the law of nations, [and] an offence against the universal law of society, a pirate being deemed an enemy of the human race." *United States* v. *Smith*, 18 U.S. (5 Wheat.) 153, 161 (1820). Indeed, "[t]here is scarcely a writer on the law of nations, who does not allude to piracy as a

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[13] Although not a party to the Convention, the United States has recognized UNCLOS as reflecting customary international law. See, *e.g.*, U.S. Dep't of State, *Digest of United States Practice in International Law* 480 (Elizabeth R. Wilcox ed., 2009).

crime of a settled and determinate nature; and whatever may be the diversity of definitions, in other respects, all writers concur, in holding, that robbery, or forcible depredations upon the sea, *animo furandi*, is piracy." *Ibid.*

Moreover, "in the 18th century, nations reached consensus not only on the substantive principle that acts of piracy were universally wrong but also on the jurisdictional principle that any nation that found a pirate could prosecute him." *Sosa*, 542 U.S. at 762 (Breyer, J., concurring in part and concurring in the judgment); see also Restatement § 404 (universal jurisdiction for piracy).

B. The Piracy Prohibition Extends To Corporations.

The prohibition on piracy applies explicitly to non-state actors. Blackstone described piracy as one of the principal cases constituting "offences against that universal law, committed by *private persons*." 4 William Blackstone, *Commentaries* *73 (emphasis added). "[P]iracy in violation of the law of nations is by definition perpetrated by nonstate actors: 'A pirate is one who roves the sea in an armed vessel without any commission or passport from any prince or sovereign state, solely on his own authority, and for the purpose of seizing by force, and appropriating to himself without discrimination, every vessel he may meet.'" *Ali Shafi*, 642 F.3d at 1096 (quoting *Smith*, 18 U.S. (5 Wheat.) at 163 n.h); see also UNCLOS art.

101 (specifying that piracy is "committed for private ends by the crew or the passengers of a private ship or a private aircraft").

Modern international authorities recognize that non-state groups and organizations can and do violate the norm prohibiting piracy. The U.N. Monitoring Group on Somalia "considers Somali-based piracy to be a fundamentally criminal activity attributable to specific militia groups and 'families,'" *Rep. of the Monitoring Group on Somalia Pursuant to Security Council Resolution 1853 (2008)*, Security Council, ¶ 130, U.N. Doc. S/2010/91 (Mar. 10, 2010) (Rep. of the Monitoring Group), and it has described in detail the structure of pirate networks and militias that often consist of hundreds of pirates. *Id.* ¶¶ 131-140.

Moreover, the U.N. Security Council has explicitly stated that "individuals and entities who incite or intentionally facilitate an act of piracy are themselves engaging in piracy as defined under international law." S.C. Res. 1976 ¶ 8, U.N. Doc. S/RES/1976 (Apr. 11, 2011). The Monitoring Group has observed that pirate networks and militias already follow a typical "business model," Rep. of the Monitoring Group, annex III, that approximates a limited partnership such that "[t]he possibility of pirates operating through the corporate form is not far-fetched," *Kiobel*, 621 F.3d at 156 n.10 (Leval, J., concurring in the judgment).

In short, the prohibition of piracy extends to non-state actors and organizations. Corporations are

properly among those parties who are capable of violating the international prohibition of piracy.

* * *

As petitioners have shown, corporations and other organizations are not categorically incapable of violating international law. This brief has further demonstrated on a norm-by-norm basis that corporations and other organizations are specifically capable of violating many of the major prohibitory norms of international law that serve as a basis for actions under the ATS and TVPA, including the norms that are at issue in both the *Kiobel* and *Mohamad* cases.

CONCLUSION

Accordingly, the judgments of the courts of appeals should be reversed.

Respectfully submitted.

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DECEMBER 2011